SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 321

W. E. McCULLOCH, Auditor of Polk County, Iowa, and HAROLD E. HUGHES, Governor of State of Iowa, GARY L. CAMERON, Secretary of State of State of Iowa, LORNE R. WORTHINGTON, Auditor of State of Iowa, PAUL FRANZENBURG, Treasurer of State of Iowa, KENNETH E. OWEN, Secretary of Agriculture of State of Iowa, in Their Elective Capacities and Also Collectively and Individually As the Executive Council of the State of Iowa, and LAWRENCE F. SCALISE, Attorney General of State of Iowa, and ROBERT D. FULTON, Lieutenant Governor of State of Iowa,

Petitioners,

vs.

ELIZABETH KRUIDENIER, ROBERT R. RIGLER, LaMAR FOSTER, SR., and THOMAS S. HEFLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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No. .....

W. E. McCULLOCH, Auditor of Polk County, Iowa, and HAROLD E. HUGHES, Governor of State of Iowa, GARY L. CAMERON, Secretary of State of State of Iowa, LORNE R. WORTHINGTON, Auditor of State of Iowa, PAUL FRANZENBURG, Treasurer of State of Iowa, KENNETH E. OWEN, Secretary of Agriculture of State of Iowa, in Their Elective Capacities and Also Collectively and Individually As the Executive Council of the State of Iowa, and LAWRENCE F. SCALISE, Attorney General of State of Iowa, and ROBERT D. FULTON, Lieutenant Governor of State of Iowa,

Petitioners,

vs.

ELIZABETH KRUIDENIER, ROBERT R. RIGLER, LAMAR FOSTER, SR., and THOMAS S. HEFLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Iowa entered in the above entitled case on April 15, 1966.

1. Petitioners are all elected officials of the State of Iowa or Polk County in which the City of Des Moines, the largest city in Iowa, is primarily situated. The duties of petitioners are set forth in the petition (complaint) of respondents. (R. 4-7)

CITATIONS TO OPINIONS BELOW

The Memorandum Opinion, Findings of Fact and Conclusions of Law of the District Court in and for Polk County, Iowa, the court of original jurisdiction, are not reported and are set forth in the Record at pp. 368-404. Such opinion and findings are also appended hereto as Appendix A, infra at pp. A1-A27. The opinion of the Iowa Supreme Court, printed in Appendix B hereto, infra at pp. A28-A72, is reported in 142 N.W.2d 355. The Iowa Supreme Court opinion has not, as of the date of filing this petition, been printed in the official state reporter.

JURISDICTION

The judgment of the Supreme Court of the State of Iowa was entered as of April 15, 1966. Appendix B.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) (1964). Petitioners did not petition the Iowa Supreme Court for rehearing.

The original petition of the Respondents in Division IV thereof (R. 55-65), challenged the Iowa statute referred to below as violative of the Equal Protection Clause of the Fourteenth Amendment. The counterclaim of the Petitioners here asked the Court to declare such statute, and the reapportionment plan provided for therein, constitutional under the Fourteenth Amendment (R. 116-119). The trial court found such statute constitutional, and was reversed by the State Supreme Court on Fourteenth Amendment grounds.

The petition and both opinions also dealt with the constitutionality of the statute under the Iowa State Constitution. It is the position of the Petitioners that such

2. Reference to this opinion will be made to the appropriate page of Appendix B.

grounds do not constitute a separate and independent ground for decision, thus depriving this Court of jurisdiction. See Reasons for Granting Certiorari, infra at pp. 12-37.

QUESTIONS PRESENTED

1. Whether the 1965 Iowa temporary reapportionment plan, providing for single member and multi-member districts in both House and Senate, where the multi-member districts are created along traditional county lines, is *per se* violative of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether a reapportionment plan which provides for both multi-member districts and single member districts is violative of the Equal Protection Clause of the Fourteenth Amendment because the voters in a multi-member district are entitled to vote for each of the several representatives to be elected from such district, whereas the voter in a single member district is entitled to vote for only one such representative.

   or

   Whether a reapportionment plan which provides for both multi-member districts and single member districts is violative of the Equal Protection Clause of the Fourteenth Amendment even though providing for apportionment between districts on an equal population basis, unless the votes of the voters in a single member district are equivalent to the votes of voters in a multi-member district, in the sense that the weight to be accorded such votes in voting for *the number* of representatives does not exceed the constitutionally permissible variance usually applied to apportionment on a population basis.

3. Whether a finding by a state court, supported only by evidence of the advantages to voter and elected representatives in single member districts, as opposed to multi-member districts, and by evidence that the voter in a multi-member district is enti-

tled to vote for more representatives than a voter in a single member district, is sufficient under the equal protection clause and the due process clause of the Fourteenth Amendment to support, factually, the conclusion that a reapportionment plan providing for both single and multi-member districts invidiously discriminates against either (a) the voter in a multi-member district, or (b) the voter in a single member district.

4. Whether the 1965 reapportionment plan, providing for 11 representatives and 5 senators to be elected at large in Polk County, Iowa, is violative of the Equal Protection Clause because the ballot is long and cumbersome and there are no identifiable constituencies.

STATUTES INVOLVED

The Iowa statutory provision directly involved is Chapter 88, Acts of the 61st General Assembly (Iowa 1965). This statute is reprinted in full in Appendix C, infra at pp. A72-A82.

Also set forth in full in Appendix D, infra at pp. A95-A96, are the following provisions of the Iowa Constitution which Petitioners believe are necessary for a complete understanding of the statute referred to above:

Article I, Section 6.
Article III, Section 37.
Article III, Section 34.
Article III, Section 35.
Article III, Section 36.

STATEMENT OF CASE

On May 10, 1965, Respondents, all registered voters of the State of Iowa (R. 3), commenced this action, attacking the validity of Iowa's 1965 temporary reapportionment plan.[3]

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3. The petition of the Respondents (the Plaintiffs in the court below) originally attacked the 1964 temporary reapportionment plan. This plan was held prospectively invalid by the

Petitioners filed a special appearance in the District Court attacking the jurisdiction of the State Court because of the existence of a similar class action then pending in

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Footnote 3 (continued)—

three-man Federal District Court in *Davis* v. *Cameron*, 238 F.Supp. 462 (S.D. Iowa 1965) and was replaced by the statute here under attack. Respondents amended their petition to include an attack on the 1965 plan, which was passed on May 27, 1965. (R. 43-65)

The action was commenced and prosecuted as a class action on behalf of the Respondents and on behalf of all other voters in the State of Iowa similarly situated. (R. 4) See Iowa Rules of Civil Procedure 42 (1962) which is similar to the comparable federal rule.

The petition was originally filed while the Sixty-first General Assembly of the State of Iowa was in session. The attack on the 1964 plan was held as moot by the District Court (R. 397), which finding was not attacked on appeal to the State Supreme Court. Petitioners conceive that the validity of the 1964 plan is not here in question because of this finding, and further because such plan was replaced by the 1965 plan.

The 1965 plan here under attack provides for subdistricting in both House and Senate of the Iowa legislature. The plan is attached as Appendix C, infra at pp. A72-A82. The following is a summary of the Senate plan:

Single member districts	Total population*
42	1,762,833

Multi-member districts	Total population*
7	895,762

All of the multi-member districts consist of one county. In four such districts, two senators are elected; the population of said counties varies from 80,048 (District 30, Dubuque County) to 119,067 (District 15, Scott County). In two such districts, three senators are elected; the population of those counties is 122,482 (District 32, Black Hawk County) and 136,899 (District 24, Linn County). Polk County, in which the city of Des Moines is located, comprises the remaining multi-member district; it is allotted five senators and its population is 266,315.

House of Representatives: The plan provides for 124 representatives in 81 districts.

Single member districts	Total population*
63	1,234,745

Multi-member districts	Total population*
18	1,423,850

the Federal District Court for the Southern District of Iowa in which the Court had retained jurisdiction.[4]

The special appearance was sustained by the trial court (R. 92) which was reversed by the Supreme Court of Iowa upon the interlocutory appeal of Respondents.[5] *Kruidenier* v. *McCulloch*, 136 N.W.2d 546 (Iowa, 1965).

After this decision, Petitioners filed their answer and a counterclaim. The counterclaim was in the nature of a declaratory judgment asking that the 1965 plan be adjudged as a constitutional temporary plan under the then known constitutional standards (R. 116-119).

In their counterclaim these Petitioners alleged ". . . that the controversy between these plaintiffs and these defendants as to the constitutionality of the 1965 temporary reapportionment plan should also involve the real and substantial issue as to whether this plan meets the federal constitutional requirements as to fair representation of voting rights." (R. 117-118).

Footnote 3 (continued)—

Eleven districts, all of which except the eighteenth comprising one county, elect two representatives. One district, consisting of one county, elects three representatives. One district, consisting of one county, elects four representatives. Three districts, each consisting of one county, elect five representatives. One county-wide district elects six representatives. One county-wide district elects eleven representatives.

*Respondents did not attack the population variances of the plan.

4. *Davis* v. *Cameron*, 238 F.Supp. 462 (D.C.S.D. Iowa 1965). The order of the Federal Court in this regard is set forth in the Record at pp. 40-42.

5. After the decision of the Iowa Supreme Court, holding, in effect, that the state court had jurisdiction of this case, the Respondents filed a motion of intervention and were permitted to intervene in *Davis* v. *Cameron*, *supra*, note 3. Thereafter, the intervenors' motion to stay the proceedings of the federal court was granted. (R. 100)

The cause came on for trial before the Polk County District Court on September 30, 1965, the Honorable Harry Perkins presiding. The Respondent's evidence can be summarized as follows:

a. The difficulties in campaigning in Polk County, a multi-member district under both 1964 and 1965 reapportionment plans, as opposed to smaller or single member districts.

b. The difficulties of a voter making intelligent choices in a large multi-member district.

c. Evidence that one Republican representative (the minority party) could have been elected from Polk County if a subdistrict had been laid out in a particular area of Polk County.

d. Evidence of a political scientist, offered as expert evidence, in regard to the desirability of subdistricts generally.

e. Testimony of the same political scientist that the "best plan" for Polk County would be a combination of subdistricts and multi-member districts.

The Petitioners' evidence was offered to show that the 1964 and 1965 plans had a reasonable basis and were good faith attempts to follow the state and federal constitutional requirements. The evidence also indicated that the legislature had the honest belief that subdistricting was prohibited by the Iowa Constitution and that, therefore, the only reasonable alternative to comply with the population requirements of the Equal Protection Clause of the Federal Constitution was to create, in some cases, larger multi-member districts.

On November 5, 1965, the trial court ruled in favor of Petitioners and also sustained their counter-claim. Appendix A, infra at pp. A1-A27. See also R. 368-404.

The Respondents appealed to the Iowa Supreme Court, which, on April 15, 1966, held that:

> ". . . the 1965 temporary reapportionment plan violates section 6, Article I of the Constitution of Iowa and the 14th amendment to the Constitution of the United States." (Appendix B, infra at p. A67).

The Court also indicated as follows:

> "We believe it difficult, if not impossible, to justify constitutionally, a multi-member district in which the ratio of members therein exceeds the variance in population between districts which has been approved by the United States Supreme Court." (Appendix B, infra at p. A67).

As a result of this holding, the trial court's decision on the constitutional issues was reversed. The Iowa Supreme Court retained jurisdiction of the case "to consider prescribing an interim plan of reapportionment providing for subdistricting in Polk County in the event that it becomes apparent that no substantial progress is being made by the Sixty-second General Assembly to provide for such subdistricting."[6] (Appendix B, infra at p. A54).

General Background

In order for the Court to fully appreciate the significance of this case, Petitioners believe that a general statement of the background of the history of reapportionment in Iowa is necessary.

The original Iowa Constitutions of 1846 and 1857 provided for apportionment of both the House and the Senate on a population basis. Included in the apportionment sections of these constitutions is the provision which now appears in Article III, Section 37, as follows:

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6. The Sixty-second General Assembly will convene in January, 1967.

> "When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district."

The Constitution was amended in 1904 to limit the House of Representatives to one representative per county with the nine largest counties getting an extra representative. The 1928 constitution was amended to limit a county to one senator. (The limit of Fifty senators had been established by the 1904 amendment and was retained.) An accurate statement of this history may be found in the opinion of the Iowa Supreme Court, Appendix B, infra at pp. A31-A32.

In 1961 the first apportionment of the State of Iowa in the Twentieth Century occurred and was limited by the amendments of 1904 and 1928 to the constitution. In 1962 the Iowa Supreme Court sustained the apportionment against constitutional attack in *Selzer* v. *Synhorst*, 253 Iowa 936, 113 N.W.2d 724 (1962), despite wide population variances. In May 1963 a three-judge district court in *Davis* v. *Synhorst*, 217 F.Supp. 492 (S.D. Iowa 1963) held that there was malapportionment of the Iowa legislature in violation of the Equal Protection Clause of the United States Constitution.[7]

The federal district court, however, did not order any legislative action because of a then pending constitutional amendment on reapportionment, which subsequently failed.

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7. For example, at that time, under the 1960 census, Adams County with a population of 7,468 had one house representative, while Polk County, with a population of 266,315, had two representatives.

On January 4, 1964, the three-judge court ruled that three sections of the Iowa Constitution were invalid.[8]

The court, however, held that Article III, Section 37, which prevented the division of a county, was severable from the other provisions and was valid. The court directed the legislature to adopt a temporary plan until new constitutional provisions could be adopted. *Davis* v. *Synhorst*, 225 F.Supp. 689 (S.D. Iowa 1964),[9] aff'd on appeal, *Hill* v. *Davis*, 378 U.S. 565 (1964).

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8. The three sections are here set forth:

"Sec. 34. The number of senators shall at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties, according to the number of inhabitants in each."

"Sec. 35. The Senate shall not consist of more than fifty members, nor the House of Representatives of more than one hundred; and they shall be apportioned among the several counties and representative districts of the State, according to the number of inhabitants in each, upon ratios to be fixed by law; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled to one representative; and any one county containing in addition to the ratio fixed by law, one half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed."

"Sec. 36. At its first session under this Constitution, and at every subsequent regular session, the General Assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative."

9. The action in the three-judge district court was a class action, although the Respondents here were not named as parties nor did they participate in such action.

Shortly after this decision, the Governor of Iowa convened a Special Session of the General Assembly, which enacted Senate File 1, Acts of the 60th General Assembly, Extraordinary Session (Iowa 1964) (the "1964 Plan"). This plan increased the number of senators from 50 to 59 and increased the number of representatives from 108 to 124. The plan primarily added representatives and senators to the larger counties and combined the smallest counties into senatorial and representative districts. There was no attempt to subdistrict because of the holding in *Davis* v. *Synhorst*, 225 F.Supp. 689 (S.D. Iowa 1964), which upheld the validity of Article III, Section 37, which was then being interpreted to prevent subdistricting. The Plan was an attempt to meet the judicially determined requirements of the Fourteenth Amendment to the federal constitution. The 1964 plan was approved by the three-judge panel in *Davis* v. *Synhorst*, 231 F.Supp. 540 (S.D. Iowa 1964). The opinion of the United States Supreme Court in *Hill* v. *Davis*, supra, had approved the 1964 plan only insofar as that plan was consistent with *Reynolds* v. *Sims*, decided in the interim. In February 1965, and consistent with the holding of *Reynolds*, the three-judge federal court held that the 1964 plan was prospectively null and void and that the legislature, which was then in regular session, should devise a new plan. The court reserved jurisdiction. The legislature then passed what is now Chapter 88, Acts of the 61st General Assembly (Iowa 1965), which is here referred to as the "1965 temporary apportionment plan." The 1965 plan did not change the apportionment plan of the house which the three-judge panel had previously indicated was satisfactory. The Senate plan was revised to obtain a more equal population basis and two additional senators were added. The 1965 plan did not provide for subdistricting.

REASONS FOR GRANTING THE WRIT

The opinion of the Iowa Supreme Court, in reality, is three opinions. In a judgment in which all nine justices concurred, the Court held that after 1966, Polk County had to be subdistricted. The basis of this holding was that, under the circumstances presented, the failure to subdistrict Polk County violated the "equal protection" rights of citizens of Polk County.[10]

In the "majority opinion" of Justice Stuart, in which five justices concurred (Appendix B, infra at pp. A55-A69), the Court further held that the ". . . 1965 temporary reapportionment plan violates Section 6, Article 1 of the Constitution of Iowa and the 14th Amendment to the Constitution of the United States."[11] Appendix B, infra at p. A67.

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10. Compare the following language from Division XIII of the "minority opinion", the opinion of Justice Mason:

> "The record indicates many of the same objections contained in Lucas, Fortson and Drew, supra, existed in the 1964 Polk County election and will probably continue to exist there unless we direct subdistricting in that county. . . .
>
> While we hold the 1965 temporary reapportionment plan is sufficient for the 1966 elections, this record leads us to the conclusion that in order to provide equal protection of the laws, subdistricting is necessary in Polk County thereafter." Appendix B, infra at pp. A51-A52.

with the following language of Division XIII of Justice Stuart's opinion:

> "We agree with that portion of Division XIII of the principle opinion which holds the 1965 temporary plan denies equal protection to the residents of Polk County." Appendix B, infra at p. A67.

This language, together with a full reading of both opinions on this Question amply justify the conclusion that the Court based its narrow holding on the issue of subdistricting in Polk County, on the federal requirements imposed by Section 1 of the Fourteenth Amendment.

11. The "minority opinion" of Justice Mason seemingly disagrees with this holding:

> "We reject the contention that formation of single-member districts is necessarily required by either section 6, Article 1, of the state constitution, or Section 1, Amendment 14, of the federal constitution."

The Court gave as its primary reason, if not the sole reason, for so holding, the following:

> "The Supreme Court recognized in *Reynolds* v. *Sims*, supra, that mathematical precision was not a workable constitutional requirement. 'So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible.' The same legitimate considerations which would make multi-member districts constitutionally permissible under the Iowa Constitution apply here. We believe it difficult, if not impossible, however, to justify constitutionally, a multi-member district in which the ratio of members therein to a single-member district exceeds the variance in population between districts which has been approved by the United States Supreme Court." Appendix B, infra p. A67.

In other words, the Court was of the opinion and so held that because the 1965 reapportionment plan provided for multi-member districts and single member districts in the same house of a legislature, that, in and of itself, was a violation of the Equal Protection Clause of the Fourteenth Amendment, unless the proponents of the plan, here the Petitioners, made a showing that the ratio of representatives from a multi-member district to a single member district did not exceed the constitutionally permissible variance in population between districts.[12]

It is Petitioners' position that this holding is not in accord with the applicable decisions of this court on the

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12. Petitioners concede that no such showing was here made. In fact, such ratio varies from approximately two to one to eleven to one.

substantial federal question presented and that, therefore, this Petition should be granted.[13]

The Applicable Decisions of This Court

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the Court, in dicta, recognized that while a state may legitimately desire to maintain geographic and political subdivisions to provide for flexibility in representative government, the overriding considerations must remain substantial voter equality—the "one-man, one-vote" principle. *Reynolds* further states that one house of a state legislature might contain ". . . at least some. . . ." multi-member districts. Several federal and state courts before and since *Reynolds* have assumed the validity of multi-member districts, and then applied the equal protection requirement to them, an assumption which is reasonable in light of *Reynolds* and one which Petitioners believe to be controlling here.[14]

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13. Petitioners rely upon each of the three questions set forth under the heading "Questions Presented" for the granting of this writ. However, the discussion here will be limited to a demonstration that the decision of the majority that the 1965 reapportionment plan violated equal protection is clearly not in accord with the applicable decisions of this Court, and the reasons Petitioners feel this case is sufficiently important to justify the granting of this writ.

14. Prior to *Reynolds*, in *Drew* v. *Scranton*, 229 F.Supp. 310 (N.D. Penn. 1964), a three-judge district court held invalid the Pennsylvania apportionment act which provided for two, three and four member districts around single member districts, concluding that absent any legislative history or other justifying reasons, "such districting is either a result of gerrymandering for partisan advantage . . . or it was wholly arbitrary and capricious." After *Reynolds* v. *Sims*, the Pennsylvania Supreme Court in *Butcher* v. *Bloom*, 415 Pa. 438, 203 A.2d 556 (1964), dealing with the same reapportionment plan held that single member districts were more appropriate than multi-member districts in apportionment schemes but admitted that valid and compelling reasons

After *Reynolds*, the Court assumed in *Lucas* v. *Forty-Fourth Colorado General Assembly*, 377 U.S. 713 (1964), the validity of multi-member districts in this language:

> "We do not intimate that apportionment schemes which provide for the at large election of a number of legislators from a county, or any . . . at large election of a number of legislators from a county, or any political subdivision are constitutionally defective. Rather, we merely point out that there are certain aspects of electing representatives at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multi-member counties." 377 U.S. 713, 731 (1964). Footnote 21.

In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), the case which most logically follows in sequence in a discussion of the constitutional status of multi-member districts, the Court was dealing with Georgia's apportionment plan which created for the senate twenty-one multi-member districts in which from two to seven senators were elected, and thirty-three single member districts. The plan was not attacked on a population basis, but rather it was urged that, since a senator was required to be a resident of a subdistrict of a multi-member district, and although he

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Footnote 14 (continued)—

might require the later arrangements and render them valid. Thereafter, this Court vacated and remanded *Drew* by way of a per curiam opinion, 379 U.S. 40 (1965), citing *Reynolds* and *Butcher*, together with the other intervening decisions of this Court. The Iowa Supreme Court, in arriving at its conclusion that multi-member districts were per se invalid, relied heavily upon *Drew*, and indicated that its reversal was for reasons other than the district court's disapproval of multi-member districts. Although Petitioners do not wish to speculate as to why the Court reversed *Drew*, nonetheless, the case is doubtful authority for the Iowa Court's holding of the per se invalidity of multi-member districts. See also *Davis* v. *Cameron*, 238 F.Supp. 462 (S.D. Iowa 1965); *Stout* v. *Bottorff*, 246 F.Supp. 825 (S.D. Ind. 1965).

was to be voted upon by all the voters of the district, the plan violated equal protection. This Court found that such a plan did not violate equal protection, rejecting as "hypothetical and impractical" petitioner's contention that the voting scheme was mathematically capable of nullifying the unanimous choice of the voters of any subdistrict of its choice of senator. Again, this Court recognized that multi-member districts would be permissible, although the opinion was careful to point out that the creation of multi-member districts which, in fact, would minimize or cancel out the voting strength of racial or political elements might be violative of the Equal Protection Clause.

Thus, in *Reynolds*, *Lucas*, and *Fortson*, supra, the Court recognized the validity of apportionment plans which provided for both multi-member and single-member districts. In fact, prior to Fortson, in the only case which disapproved the use of multi-member districts, the Court reversed.[15] Nonetheless, it was clear from these three opinions, that under some circumstances a multi-member district which designedly, or otherwise, subverted racial and political elements, might be violative of the Equal Protection Clause of the Fourteenth Amendment.[16]

The last case to reach the Court involving the validity of multi-member districts was *Burns* v. *Richardson*, 34 U.S.L.W. 4365 (1966). In reversing the holding of a three-judge district court's decision that Hawaii's temporary reapportionment plan was violative of equal protection, the court said as follows:

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15. See *Drew* v. *Scranton*, 229 F.Supp. 310 (N.D. Penn. 1964), reversed, 379 U.S. 40 (1965).

16. cf., *Wright* v. *Rockfeller*, 376 U.S. 52 (1964).

"Where the requirements of *Reynolds* v. *Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case would operate to minimize or cancel out the voting strength of racial or political elements of the voting population'.

"It may be that invidious effect can more easily be shown if, in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if subdistricts characterize both houses of a bicameral legislature rather than one. But the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. Cf. McGowan v. Maryland, 366 U.S. 420. That demonstration was not made here. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting. Indeed, while it would have been better had the court not insisted that the legislature 'justify' its proposal, except insofar as it thus reserved to itself the ultimate decision of constitutionality vel non, the legislature did assign reasons for its choice. Once the District Court had decided, properly, not to impose its own senate apportionment but to allow the legislature to frame one, such judgments were exclusively for the legislature to make. They were subject to constitutional challenge only upon a demonstration that the interim apportionment, although made on a proper population basis, was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 34 U.S.L.W. 4365 at 4369 (1966).

The sole factual basis which the Iowa Supreme Court relied upon to reach its conclusion that the 1965 reapportionment plan violated the Equal Protection Clause of the Fourteenth Amendment is summarized in the Statement of Case, supra at pp. 4-11. Petitioners believe that this evidence fails to support the conclusion that the plan invidiously discriminates against citizens of Polk County, within the test set forth in *Burns* v. *Richardson*, supra.

Petitioners also believe that the decisions of this Court referred to above hardly justify the conclusion of the Iowa Supreme Court that:

> it . . . /is/ . . . difficult, if not impossible . . . to justify constitutionally, a multi-member district in which the ratio of members therein to a single member district exceeds the variance in population between districts which has been approved by the United States Supreme Court.

This holding is at odds with the dicta of *Reynolds* and *Lucas*, supra, and the holding of *Fortson* and *Burns*. Indeed, Petitioners have been able to find no case law by any court and no other authority which supports this novel proposition.[17]

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17. Since *Fortson*, supra, and *Burns* v. *Richardson*, supra, the Court has considered other multi-member districting cases, but solely on records, briefs and per curiam opinions. At least three of such cases have significance here, however. In *Burnett* v. *Davis*, and its companion, *Thornton* v. *Davis*, 86 S. Ct. 181 (1965), the Court affirmed the holding of a three judge district court that the Fourteenth and Fifteenth Amendments were not violated by a multi-member district consisting of the City of Richmond, Virginia, and contiguous Henrico County, despite the fact that the arrangement might prevent Negro and rural voters in the County from electing Negro and rural representatives, respectively. Petitioners deem these two cases almost identical with the facts presented here. In *Yancey* v. *Faubus*, 251 F.Supp. 998 (D.C. Ark. 1965), affirmed, 86 S. Ct. 933 (1966), the Court affirmed the

It is therefore submitted, that the decision of the Iowa Supreme Court that a reapportionment scheme which provides for single member and multi-member districts in both houses of a bicameral legislature is violative of the Equal Protection Clause of the Fourteenth Amendment, is clearly in conflict with the applicable decisions of this Court. It is further submitted that this case meets the requirements of Rule 19 of the Rules of this Court with regard to the considerations governing review on certiorari.

Footnote 17 (continued)—

holding of a three judge district court upholding, on constitutional grounds, the Arkansas reapportionment plan. The plan provides for multi-member districts and single member districts in both the house and senate. The district court said:

> In attacking the plan the objecting parties contend generally that in creating multi-county and multi-member districts for both Houses the Board acted unconstitutionally, and that the Board's adherence to county lines in creating the respective districts created such disparities of population among the several districts as to violate the "one man, one vote" philosophy of the Reapportionment cases. Id. at pp. 1000-1001.
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> * * *
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> We first consider and reject the contention that the plan is automatically unconstitutional because both Houses will consist in part of multi-member and multi-county districts. We see nothing unconstitutional about legislative districts, whether a House district or a Senate district, consisting of more than one county, or about a county containing more than one legislative district. Id. at p. 1001.

In *Swann* v. *Adams,* (S.D. Fla., March 18, 1966) upon remand from a reversal of its previous decision (Swann v. Adams, 86 S. Ct. 767 (1966)), the three judge district court upheld the validity of the proposed Florida reapportionment plan. In so doing the Court stated:

> Finally, the proposed plan contains several multi county, multi representative or multi senator districts. However unwise and undesirable these may be, we find nothing in their nature that violates the federal constitution. See Fortson v. Dorsey, supra.

The Non Federal Basis of the State Court Decision

All nine Justices of the Iowa Supreme Court concurred in the opinion that subdistricting was required in Polk County because, under the circumstances presented, the failure to subdistrict was violative of the equal protection rights of the citizens of Polk County guaranteed to them by Section 1 of Amendment 14 to the Federal Constitution. Appendix B, infra at pp. A50-A53 and p. A67.

It is Petitioners' position that the narrow holding of the Court that the failure to subdistrict Polk County was violative of equal protection was based squarely on federal grounds and is, therefore, reviewable by this Court.

The Iowa Supreme Court decided the first "Question Presented" not only on the basis of its interpretation of the equal protection clause of the Fourteenth Amendment[18] to the United States Constitution, but also on the similar section of the Iowa Constitution which provides as follows:

> "All laws of a general nature shall have uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Article 1, Section 6, Iowa Constitution (1962).

In the specific language of the Court:

> ". . . [we hold] . . . that any scheme of legislative apportionment in which there are multi-member districts and single member districts impairs the right of a resident of a single member district to have the laws operate uniformly as guaranteed by Section 6, Article 1 of the [State] Constitution." Appendix B, infra at page A57.

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18. "We therefore hold that the 1965 temporary reapportionment plan violates . . . the 14th Amendment to the Constitution of the United States." Appendix B, infra at page A67.

If the judgment of the state court was alternatively based upon its interpretation of the Iowa Constitution, and if this non-federal basis for its judgment is adequate to support the decision of the Iowa Court, Petitioners concede that this Court should not review the question presented.[19]

If the judgment of the state court, however, was based solely on its interpretation of the federal constitution,[20] ". . . or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution. . . ."[21] then this Court would have

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19. See *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Berea College* v. *Kentucky*, 211 U.S. 45, 53 (1908). See also *Herb* v. *Pitcairn*, 324 U.S. 117 (1945) (125-26). ("The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.")

Petitioners are also cognizant that this principle is so firm that even if the Petition here made be granted, the Court may dismiss at a later time if it finds that the foregoing principle applies. It is for this reason that some space is here devoted to Petitioner's views that the non-federal basis for the decision does not preclude the court from reviewing the question presented. Cf., *Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958). In this connection, see *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 196 (1965).

20. *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194, 196 (1965).

21. Id.

jurisdiction to review the federal question presented.[22] Moreover, if the decision of the state court on the non-federal question is not broad enough,[23] or adequate enough[24] to support its judgment, this court could review the federal question presented. Finally, if the judgment on the non-federal question is not tenable, in the sense that it is "unreasonable",[25] or "without any fair or substantial support"[26] or so "certainly unfounded that it may properly be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question. . . ."[27] this Court has jurisdiction to review the federal question presented despite the presence of a ground for the decision of the state court which would otherwise be sufficient to support its judgment.

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22. Ibid. See also *State Tax Commission* v. *Van Cott*, 306 U.S. 511, 514 (1939).

> "If the [state court] were only incidentally referring to decisions of this Court in determining the meaning of the state law . . . this Court would have no jurisdiction to review the question. But, if the state court did in fact intend alternatively to base its decision upon the state statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of state law." *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

23. *Murdock* v. *Memphis*, 87 U.S. (20 Wall) 590, 636 (1875).

24. *Enterprize Irrig. Dist.* v. *Farmer's Mutual Canal Co.*, 243 U.S. 157, 163-64 (1917).

25. *Vandalia R.R.* v. *Indiana ex rel. City of South Bend*, 207 U.S. 359, 367 (1907).

26. *Ward* v. *Board of County Comm'rs*, 253 U.S. 17, 22 (1920).

27. *Enterprize Irrig. Dist.* v. *Farmer's Mutual Canal Co.*, 243 U.S. 157, 165 (1917). In this connection see Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harv. L. Rev. 1375 (1961).

A.

The decision of the state court that subdistricting was required by its constitution was either compelled by its interpretation of the Equal Protection Clause of the Fourteenth Amendment, or was not broad enough to support its decision.

Since 1846, there has been no subdistricting in Iowa, presumably because of Article III, Section 37, of the Iowa Constitution which provides:

> ". . . no county shall be divided in forming a congressional, senatorial, or representative district."

Contrary to prior interpretations of this Article,[28] the Iowa Supreme Court, in an opinion in which all nine justices concurred, held this section permitted, but did not compel subdistricting. The reason assigned for the holding was that the interpretation urged by the Petitioners that the Section prevented the subdistricting of a county, ". . . would violate the equal protection clause of Section 1 of the Amendment 14 of the federal constitution." The Iowa court selected its interpretation in line with the recognized rule that when a statutory or constitutional provision can be interpreted in two ways, one of which is constitutional and one of which is not, the former interpretation should be adopted. See Appendix B, infra at page A38.

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28. It was assumed by the legislature in enacting both the 1964 and 1965 interim apportionment plans that this section prevented subdistricting. See Statement of Case, supra p. 11. The three judge district court also made the same assumption. *Davis v. Synhorst*, 225 F.Supp. 689 (S.D. Iowa 1964). It is for this reason that the plan here under attack made provision for multi-member districts. See Opinion of the Hon. Harry Perkins, Appendix A, infra at p. A16.

Apart from the present case, all of the prior case law decided under provisions similar to the section of the Iowa Constitution here under consideration holds that such provision prohibits subdistricting of a county. See *White* v. *Anderson,* 394 P.2d 333 (Colo. S. Ct. 1964); *Stout* v. *Bottorff,* 246 F.Supp. 825 (S.D. Ind. 1965); *Baker* v. *Carr,* 247 F.Supp. 629 (M.D. Tenn. 1965); *Williams* v. *Carr,* (Tenn. S. Ct. May 16, 1966) (not yet reported in either official or unofficial reports); *Sims* v. *Baggett,* 247 F.Supp. 96 (M.D. Ala. 1965).

In *White* v. *Anderson,* supra, at 337, the court indicated its reasons for adopting the interpretation urged by these petitioners and rejected by the Iowa Court in the following language:

> "It is common knowledge that constitutions of other states were considered by the convention in framing our constitution. At least one of those constitutions expressly provided that a portion of one county could not be added to another to form a district, while other constitutions being considered had the same complete interdictions against division of counties which appears in our constitution. If the framers of our constitution intended to only prohibit the division of a county for the purpose of joinder to another county, they had before them the exact language necessary to accomplish that purpose. That our constitutional convention did not adopt that language but chose instead words which clearly provided that a county shall not be divided in formation of a district has significance; it is persuasive of the fact that it did not want single counties to form multiple districts.
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> Moreover, in states whose constitutions contain a phrase providing that no county shall be divided in the formation of a district amendments to those constitutions have been enacted permitted the provision of counties before any legislative division of such counties into so-called subdistricts has been made. See,

e.g., the constitutions of California, Connecticut, Michigan, Missouri, North Carolina, and Oregon."

When this language and reasoning is compared to the reason given by the Iowa court for its conclusion that Article III, Sec. 37 permits subdistricting, strong support is given to Petitioner's conclusion that the Iowa Court was compelled to interpret such decision in light of their erroneous interpretation of the 14th amendment's equal protection clause. The opinion of the Iowa Court states, for instance:

> "Further, if section 37, Art. III were construed to prohibit subdistricting of a single county where such subdistricting is necessary to provide equal protection of the laws . . . it would violate section 1 of Amendment 14 of the Federal constitution." Appendix B, infra at p. A38.

In the court's language:

> Further, if section 37, Article III, were construed to prohibit subdistricting of a single county where such subdistricting is necessary to provide equal protection of the laws . . . it would violate the equal protection clause of section 1 of Amendment 14 of the federal constitution. Since the federal constitution is, of course, supreme, such a construction of section 37 would render it of no effect.
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> . . . .
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> Under the construction we give section 37, Article III, of our own constitution there is no violation of the equal protection of Amendment 14. Appendix B, infra at pages A38-A39.

The Court also indicated that such interpretation was compelled by Article I, Section 6, of the Iowa Constitution. Appendix B, infra at page A38. But in so doing, the Court neither discussed the historical basis for this pro-

vision or the substantial body of case law and authority which is available to explain the presence of such a provision within a state constitution.[29] Indeed, the only substantial reason given for such interpretation is that the United States Supreme Court requires it.

Once the Court had arrived at the conclusion that Article III, Section 37, had to be interpreted to mean that subdistricting was permissible because of the federal equal protection clause, the Court was then logically bound to reach the conclusion that it did reach; that the 1965 Iowa reapportionment plan violated federal equal protection because it did not provide for subdistricting. Although the Court lost its unanimity on this particular issue[30] the majority opinion still ". . . leaves the impression that the Court probably felt constrained to rule as it did because of [this court's decisions applying the 14th amendment]," *Minnesota* v. *National Tea Co.*, 209 U.S. 551, 554-55, or "because it felt under compulsion of federal law as enunciated by this Court so to hold," *Missouri ex rel. South R. Co.* v. *Mayfield*, 340 U.S. 1, 5, with the result that the state and federal grounds are "so interwoven that [petitioners] are unable to conclude that the judgment rests upon an independent interpretation of state law. *State Tax Comm'n*

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29. At least 4 other states have provisions which are substantially similar to Art. III, Section 37 of the Iowa Constitution. See Art. IX, Sec. 197-203, Constitution of Alabama; Art. V, Sec. 47, Constitution of Colorado; Art. 4, Sec. 6, Constitution of Indiana; Art. II, Sec. 6, Constitution of Tennessee.

30. The majority opinion on this issue is the opinion of Justice Stuart. Appendix B, infra at pp. A55-A69.

v. *Van Cott*, 306 U.S. 511, 514." *Jankovitch* v. *Toll Road Comm'n*, 379 U.S. 487, 492 (1965).[31]

The decision of the Iowa Court that Article I, Section 6, of its Constitution requires subdistricting is not tenable since it is without fair or substantial support, or "so certainly unfounded that it may properly be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question."

Apart from the physical structure of the opinion, the fact that the Court cites no case law or authority for its position that the 1965 plan violates Article I, Section 6, this holding is contrary to the prior holdings of the court in interpreting the constitutional provision.

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31. The physical structure of the opinion itself is strong indication that the court was compelled by what it believed to be the Court's interpretation of the 14th Amendment's equal protection clause to hold that the Iowa Constitution both permitted and compelled subdistricting. For example, the decision holding the plan violative of the state constitution, while it precedes the holding on the federal ground, is but one page long as compared to the seven pages of the opinion devoted to the federal holding. The decision on state grounds cites no case law and no authority for its position. In fact, nothing but federal decisions are cited in the majority opinion, other than the decision of the Pennsylvania Supreme Court in *Butcher* v. *Bloom*, 415 Pa. 438, 203 A.2d 556 (1964).

In addition, the court gives no reasons for holding the plan unconstitutional under the state constitution than to reiterate and expand upon the reasons given in its holding that the plan is violative of equal protection. In fact, the phrase "equal protection" seems to have been used by the court in its opinion whether it is referring to the Iowa Constitution or the first section of the 14th Amendment. Compare Appendix B, infra at pp. A55-A57 with pp. A57-A67. In this connection see *Irwin* v. *Doud*, 359 U.S. 394 (1959), where the majority of the Court found that the state court had decided a Federal issue, and that a state ground of decision did not preclude review. The physical structure of the opinion, and the language of the state court strongly argued against their conclusion. See dissenting opinion of Frankfurter, J., 359 U.S. at 407-412.

The Iowa case law interpreting Article I, Section 6, prior to this case was identical with the Federal interpretation of the equal protection clause.[32] That interpretation was best stated in *Steinberg-Baum & Co.* v. *Countryman*, 247 Iowa 923, 77 N.W.2d 15 (1956), as follows:

> It is fundamental that this constitutional provision /Sec. 6 of Article I, supra/ does not require that all laws shall apply alike to all citizens of the State. It is sufficient if a statute applies equally to all members of a class, provided the classification is not purely arbitrary but rests upon some reasonable basis. It is equally settled that the Legislature has wide discretion in determining the classes to which its Acts shall apply.

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32. Petitioners are not mindful of the dicta in *Minn.* v. *National Tea Co.*, 209 U.S. 551 (1940), to the effect that "in this type of case we deem it essential that this procedure be followed. It is possible that the state court employed the decision under the federal constitution merely as persuasive authorities for its independent interpretation of the State constitution. If that were true, we would have no jurisdiction to reverse.", nor of this court's holding in *New York City* v. *Central Savings Bank*, 306 U.S. 661, in which this Court dismissed a state appeal which involved an interpretation of a city ordinance under the due process clauses of both the state and federal constitutions, which were identical.

Any fair reading of the state court's opinion in this case, however, either indicates that the state court was compelled by its erroneous interpretation of the federal law to reach its decision on the state issue, or it grounded its decision on the state issue to prevent review by this court. In this connection, see *Flourney* v. *Wiener*, 321 U.S. 253 (1944) (". . . where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review.") See also, Note, Supreme Court Disposition of State Decisions Involving Non-Federal Questions, 49 Yale L. Jr. 1463, 1465ff (1940); Hart & Wechsler, the Federal Courts and Federal System, 443 (The Foundation Press, Inc. 1953)

> Classification to meet the requirements of the Constitution must be based upon something substantial—something which distinguishes one class from another in such a way as to suggest the reasonable necessity for legislation based upon such classification.

In light of this statement, which is consistent with other holdings of the Iowa Court,[33] the statement of the Iowa court in this case that ". . . we must examine the temporary plan to determine if it has equal protection between these two classes and whether one has privileges and immunities not available to the other. . ."[34] is difficult to understand. Under the prior Iowa case law, the real issue is whether the difference in treatment between the two classes (i.e., voters in a single member district and voters in a multi-member district) is reasonable, not whether such treatment was equal. Indeed, this court in *Burns* v. *Richardson*, 34 U.S.L.W. 4365 (April 1966), has emphasized this notion by requiring a showing that the effect of the difference in treatment between districts was designed to or does subvert a political or racial minority.

There appears no reason why the prior interpretation of this Iowa Constitutional section should be different in reapportionment cases, other than the fact that it is compelled by this Court's interpretation of the 14th amendment's equal protection clause. In fact, the Iowa Court,

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33. "Article III, section 30, and Article I, section 6, of our state constitution, invoked by the plaintiff, require that the law in question have a uniform operation throughout the state. The effect of section 1, Fourteenth Amendment to the Constitution of the United States, as applied to this is substantially the same as these uniformity provisions of our own constitution. (citing cases)." *Dickinson* v. *Porter*, 240 Iowa 393, 400, 35 N.W.2d 66, 69 (1949).

34. Appendix B, infra at page A56.

as late as 1962, implicitly approved this interpretation in a state reapportionment case.[35]

In *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U.S. 651 (1927), this court, in referring to the state ground for decision said:

> "In so holding it does not appear that the court ran counter to any established rule of property of the state. An examination of the earlier state decisions discloses no such conflict of authority or inconsistency of judicial opinion on this subject as even to suggest that the court below adopted its view in order to evade the constitutional issue."

Petitioners here contend that an examination of the Iowa case law does reveal such inconsistency, and with this fact, and the fair reading of the opinion, it is clear

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35. In *Selzer* v. *Synhorst*, 253 Iowa 936, 113 N.W.2d 724 (1962), the Iowa court did not require "equal voting power" of each citizen. The language of the court is quite specific:

> "Because of the change in district boundaries and designation, the voters in seven counties who helped elect Senators in 1960 for four-year terms will, in 1962, be helping elect Senators in their new district for four-year terms. Following the 1962 election a voter in one of these counties could say (if he had voted for successful candidates) that he had voted for and was accordingly represented by two Senators. It is not unusual for a voter to have such an opportunity. It frequently happens when a voter moves from one district to another between elections. The idea that we are personally represented and represented only by officials for whom we have voted stretches too far the theory of representative government. In some states our incumbent President did not receive a majority vote. In Washington, D.C., the residents did not vote at all. The President, however, is still the President of all the people." 253 Iowa at 947-948, 113 N.W.2d at 730.

The reapportionment plan referred to had wide population variations. It should be noted that at the time the Iowa Court decided *Selzer*, supra, the "one man, one vote" principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), had not been expressed by this Court.

that the Iowa Court adopted this view of its own constitutional provision to preclude this Court from reviewing the federal question it decided so erroneously.[36]

Other factors which compel Petitioners to believe that the decision of the state court on the question of the violation of its state constitution is untenable and designed to preclude review of the federal question include:

1. The court's failure to apply the presumption of constitutionality which legislative acts are ordinarily entitled to. This presumption has been recognized by the Iowa court on innumerable occasions, and was applied by the District Court Judge who decided this case in the trial court. In the language of that judge:

> "That there is a strong presumption of constitutionality of constitutions and statutes. The plaintiffs have not overcome this strong presumption by presenting evidence of the wisdom of alternative apportionment plans or by pointing out hardships in campaigning or by evidence that it does not create perfect equality." Appendix A, infra at p. A22.

2. The court's complete lack of reference to the findings of the trial court,[37] inconsistent with its own local rule of practice which entitles such findings to "weight",[38] and the failure of the court to rely upon facts supported

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36. For other cases where this court has looked to state decisions to determine whether the state ground of decision was adequate, see *Utley* v. *St. Petersburg*, 292 U.S. 106, 111 (1934), and *Woods* v. *Nierstheimer*, 328 U.S. 211 (1946). See generally, Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harvard Law Review, 1375, 1385 (1961).

37. Appendix A, infra at pp. A15-A27.

38. Iowa R. Civ. P. 344(7) (1962).

by the record in arriving at its conclusion that the 1965 plan failed to operate uniformly.[39]

3. The fact that in arriving at its opinion the court split along partisan lines, the majority consisting of the party out of power, which would theoretically benefit most by subdistricting.

Because of the foregoing, it is submitted that the holding of the court that the 1965 interim reapportionment plan violated Article I, Section 6,[40] is not an "independent and adequate state ground for decision", which would preclude this court from reviewing the question presented. That holding is better characterized as either unreasonable, arbitrarily, or "so clearly unfounded that it may properly be regarded as essentially arbitrary, or a mere device to prevent review of the decision upon the federal question."[41]

The Importance of Granting the Writ

The holding of the State Court that a reapportionment plan which provides for multi-member and single

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39. There was no evidence at all offered to support the majority's conclusion:

> "that much legislative work is done by committees and there is a distinct advantage in having one's own representative sitting as a member of a committee considering legislation in which one has an interest. . . . Particularly in personal interest legislation, the residents of Polk County have an unfair and unequal advantage over the residents of Warren County or of any other single member district. He has a much greater opportunity to find legislators to espouse his cause and a much greater chance that one or more of his representatives will be on the committee to which his legislation is assigned. His voting power is much greater."

40. Appendix B, infra at p. A67.

41. *Enterprize Irrig. Dist.* v. *Farmer's Mutual Canal Co.*, 243 U. S. 157, 164 (1917).

member districts violates the Equal Protection Clause of the Fourteenth Amendment unless the ratio of members in a multi-member district does not exceed ". . . the variance in population between districts which has been approved by the United States Supreme Court," is contrary to the applicable decisions of this Court. And while the Iowa Court did not have the benefit of this Court's holding and opinion in *Burns* v. *Richardson*[42] before it when the instant case was decided, we deem that opinion controlling here.

However, it is the Petitioners' position that the doctrine announced in *Burns* v. *Richardson* is a reaffirmation of the doctrine that had been previously set out in the cases of *Reynolds* v. *Sims*, supra, and *Fortson* v. *Dorsey*, supra, both of which pointed out that weighted voting in a multi-member district would meet the constitutional requirements of equal population representation.

This case was the first opportunity that the Iowa Supreme Court was presented with the question of the constitutionality of any of the temporary plans for reapportionment since *Baker* v. *Carr*. The question as to the validity of such plans had been handled by a Federal three-judge district court. We acknowledge that it has been held to be useful and desirable that a State Supreme Court intervene into this area. We do, however, believe that it is necessary and desirable that the decisions of this Court be correctly applied. It is for this basic reason that this petition should be granted, and for the further basic reason that the constitutional voting rights of the citizens of Iowa be correctly determined.

While the Iowa Court, in its holding, permits the use of the 1965 plan under attack for this fall's election, the

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42. 34 L.W. 4365 (April 25, 1966).

legislature will be required, under the Court's opinion, to deal with the problem of subdistricting along the guidelines set down by the Court as constitutional principles, which lines are highly arbitrary and at best questionable, both from a political viewpoint and as a matter of "equal protection." The Iowa Court had always previously recognized the right of the legislature to classify. The Iowa Court had always given the legislature wide discretion in this regard, recognizing that the Iowa legislature was a coordinate branch of government. Population had always been a recognized classification factor.[43]

The present Chief Justice of the Iowa Supreme Court stated in *Dickinson* v. *Porter* at page 401 of the Iowa Reports that "it is not sufficient that the court may regard the reason for classification a poor one." Chief Justice Garfield further stated that the Iowa Supreme Court will not interfere "unless the plaintiff has proven the classification does not rest on a reasonable basis but is essentially arbitrary and palpably discriminating." The burden of proof in showing the unconstitutionality of a statute had always been on the party claiming unconstitutionality.[44]

The desirable features, politically, of single member districts were discussed by this Court in *Lucas* v. *Colorado Forty-Fourth General Assembly* and found by the Iowa court as proper matters to consider in arriving at its decision.[45] Indeed, other arguments can be and have

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43. See, *e.g.*, *State ex rel. Wright* v. *Board of Health*, 233 Iowa 872, 10 N.W.2d 561 (1943); *Dickinson* v. *Porter*, 240 Iowa 390, 35 N.W.2d 66 (1949).

44. *Dickinson* v. *Porter*, 240 Iowa 393, 35 N.W.2d 66 (1949); *Faber* v. *Loveless*, 249 Iowa 593, 88 N.W.2d 112 (1958).

45. It should be noted that the language in the *Lucas* case is only in regard to the *desirability*, rather than the *constitutionality*, of multi-member districts.

been advanced in favor of single member districting.[46] On the other hand, this Court (and political scientists) have recognized that considerations involving the economic and social factors in historical development of districts mitigate against single member districting. In addition, many of the reapportionment cases recognized the desirability of preserving the political identity of governmental subdivisions which is implemented by multi-member districts. But the considerations in favor and against single versus multi-member districting have been treated by the Court, and rightly so, as problems for the legislature[47] and the political scientists. They are considerations which can be best set forth and resolved through legislative, rather than judicial, action. In every sense of the word, the problem is one of politics and of political science, rather than one of constitutional law.

Any inflexible constitutional requirement of single member districts[48] such as was adopted by the Iowa Court

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46. Note the district court's reasons as set out in *Burns* v. *Richardson*, supra.

47. Justice Brennan in *Burns* v. *Richardson*, supra, stated at 34 L.W. 4366 in a footnote that: "It is the distribution of legislators rather than the method of distributing legislators that must satisfy the demands of the Equal Protection Clause."

48. At least the following states have temporary or permanent reaportionment plans which provide for multi-member and single member districts to both houses of their bicameral legislatures:

Alaska	California	Maine
Arkansas	Colorado	North Dakota

At least the following states have temporary or permanent reapportionment plans providing for single and multi-member districts in one house of their bicameral legislatures:

Arizona	Mississippi	South Dakota
Florida	Missouri	Texas
Kansas	New Jersey	Vermont
Maryland	New Mexico	Washington
Michigan	Ohio	

See *generally*, McKay, Reapportionment, Appendix (Twentieth Century Fund, Inc. 1965).

encourages the delineation of districts as purely political bases, regardless of other group interests. This Court, by permitting the use of multi-member districts if the votes are of approximately equal numerical weight,[49] absent evidence of intentional or designed submersion of recognizable group interests, as last has created the strong possibility of flexibility in maintaining present political subdivisions as the basic units of representations. At the same time, this Court has delineated the duty and power of the court reviewing the particular plan.

Justice Mason in writing what is in part a minority opinion held that Polk County, the eleven member House district, contained "the objections to multi-member districts as set out in *Lucas, Fortson* and *Drew,* supra . . . to the point where there is invidious discrimination leading to the conclusion that equal protection rights are violated. . . ." Justice Mason further held that "in order to provide equal protection of the laws subdistricting is necessary in Polk County. . . ." The majority opinion writer agreed with Justice Mason's opinion "which holds the 1965 temporary plan denies equal protection to the residents of Polk County." On this point we have a nine to nothing decision.

In regard to the rest of the state, the decision of the Iowa Court was five to four on the question as to whether the rest of the state should be subdistricted and was split along partisan lines with the majority comprising the party out of power. The majority writer used essentially political arguments to justify his belief that the existence of single member and multi-member representative districts in the same house of the legislature was per se unconsti-

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49. See *Reynolds* v. *Sims,* supra, and *Burns* v. *Richardson,* supra.

tutional. This opinion writer ignored the existing body of Iowa law and, of course, did not cite any Iowa authority. We have pointed out in our brief that very little of the opinion dealt with the court's reasons and that when the majority discussed the federal grounds, extensive treatment was made.

It is the Petitioners' contention that such novel doctrines of law, which are contrary to the established precedents of both the Supreme Court of Iowa and the Supreme Court of the United States, deprive the Petitioners of due process of law.

The Petitioners firmly believe that *Burns* v. *Richardson,* supra, as well as *Reynolds* v. *Sims,* supra, and *Fortson* v. *Dorsey,* supra, properly remove from the judicial sphere those questions which the Iowa Court answered with novel doctrines. The Iowa Court entered a legislative arena. The Iowa Court entered a political arena.

Petitioners submit that this Court has jurisdiction and should exercise it to cure the misstatements of the federal voting rights of the citizens of Iowa.

Respectfully submitted,

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.....

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APPENDIX A

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR POLK COUNTY

SEPTEMBER TERM, 1965

ELIZABETH KRUIDENIER, et al,
Plaintiffs,
vs.
W. E. McCULLOCH, et. al,
Defendants.
} **Equity No. 70685**

Findings of Fact and Conclusions of Law and Decree

This matter came on before the Court for trial upon the petition of the plaintiffs and the counter-claim of the defendants. Plaintiffs bring this proceeding as a class action. They are citizens and voters of Cedar, Chickasaw and Polk Counties, Iowa; one, a State Senator, another a State Representative. Defendants are public officials charged with duties relative to elections in Iowa. The plaintiffs appeared by their attorneys, Herrick, Langdon, Sandblom and Belin; and defendants appeared by their attorneys, Lawrence F. Scalise, Attorney General of Iowa and Timothy McCarthy, Solicitor General of Iowa. The matter was fully tried, and the Court, having heard the evidence and arguments of counsel and being fully advised in the premises, makes the following findings of fact, conclusions of law and decree.

Many issues are raised by plaintiffs' petition. Not the least troublesome problem in considering plaintiffs' allegations is the fact that over the past three years a Three Judge Federal Court has already adjudicated many of the issues now being raised in this Court. Further complicating the decision is the time factor. Two legislative apportionment schemes have already been found unconstitutional under the 14th Amendment to the United States Constitution by the Three Judge Federal Court. The first determination has been appealed to the United States Supreme Court and affirmed. The second determination found the present legislative apportionment prospectively invalid.

The Governor of Iowa called a special session of the Iowa legislature in response to the order of the Federal Court. A plan of apportionment was enacted in conformance to the Court order. When the U. S. Supreme Court decided further population consideration was required in both houses of a bicameral state legislature in Reynolds v. Sims, 377 U.S. 533, 84 Supreme Court 1362, the Three Judge Federal Courts' decision in ordering a further population factor in the Iowa Senate was complied with in the 1965 Iowa legislature.

These apportionment events in Iowa have taken place in an orderly manner over the past three years with what this Court believes is an admirable restraint being shown by all three branches of our government, judicial, executive and legislative in staying within the bounds of their historical and constitutional authorities. All three branches of our governmental structure have acted in good faith and in reliance upon such Court decisions and legal advice as were available to them.

There can be little argument that if population must be a major consideration in apportioning the Iowa Legis-

lature, as the United States Supreme Court has decreed, great strides have been made in this direction through the action of the 1964 and 1965 sessions of the Iowa legislature.

The practical effect, if plaintiffs are to prevail, would be to scrap all legislative apportionment progress accomplished to date and to start anew with standards under the Iowa Constitution and the U. S. Constitution as construed by the plaintiffs. This Court is sitting as a Court of Equity. As such, it must be fully cognizant of the enormous expense to the State of Iowa to date in arriving at the present apportionment with the 1964 special session and with the lengthy 1965 session which spent much time in considering apportionment legislation. If plaintiffs' views are to be upheld, another expensive special session would be contemplated together with the expenses of special elections necessary to fill numerous vacancies which have developed in the makeup of the legislature since it adjourned. Coupled with the expense factor is the nature of the alleged "mischief" to be corrected by the proposed adoption of admitted alternate constitutional constructions from those taken by the Three Judge Federal Court. It is inconceivable to this Court that any great harm will come to any Iowa citizen by a 61 member senate rather than a 50 member senate.

The second alleged "mischief" which the plaintiffs wish to correct is that of elections at large within a multi-representative county. The Court concedes that there are eminent political scientists, politicians, legislators and much of the Iowa press that insist that subdistricting of counties is necessary for fair apportionment. However, not everyone agrees with them, and the duty of this Court is not to count noses on this issue, but rather to determine (1) Whether the Iowa Constitution prohibits such subdis-

tricting, and (2) The constitutionality of such a provision prohibiting subdistricting, if there is one. These legal contentions will be discussed at length in this decision. The reason for this preliminary review by the Court is to document its feeling that the 1965 legislative apportionment should be found unconstitutional, if at all, only for the most compelling reasons. To do less would be a disservice to the people of Iowa.

Reapportionment legislation is not easy legislation for a legislature. It has been compared in difficulty with a person taking out his own appendix.

In reading the apportionment decisions of the Three Judge Federal Court, due deference to the legislative branch of the government and an intimate knowledge of its problems was patently evident. A decision by this Court that would place the legislature in the position of starting all over again would certainly risk wide spread political repercussions. It could cause a special session replete with lengthy wrangling and the possibility and even probability of no agreement which would leave apportioning either to this Court or an alternative of an at large state-wide election for the legislature. These extreme alternatives have not worked well in other states, and there is no indication that they would work any better in Iowa.

In detailing the equitable principles which have been considered by this Court in arriving at decision, the Court has given great weight to the timeliness of plaintiffs' suit. As pointed out by Justice Thornton of the Iowa Supreme Court in the earlier appeal herein and by Justice McManus in his recent dissent in the Three Judge Court's decision to defer to this Court on certain apportionment problems, these plaintiffs sat by for over two and a half

years while apportionment action was pending in the courts. They were well aware of the decisions being made and that two sessions of the Iowa legislature had relied on such decisions. That in this conjunction, plaintiffs could have intervened in the federal apportionment suit at any earlier time to urge the positions they now maintain.

With this record of dilatory action by plaintiffs, this Court feels strongly that as a matter of equity, plaintiffs should be held strictly to their burden of proving all their allegations by a clear preponderance of the evidence and to demonstrate any alleged unconstitutionality in such a manner as to negative any theory under which this Court might find the legislation under attack to be constitutional.

Finally, the evidence shows the proposed permanent constitutional plan of apportionment passed for the first time by the 1965 legislature does provide for a 50 member senate and for permissive subdistricting so that the complaints underlining plaintiffs' petition are even now started on their way to correction. This would be accomplished in the manner contemplated by the Iowa Constitution by a constitutional amendment being passed twice by the legislature in identical form and then being approved by a vote of the people.

It is within this framework of equitable principles that the Court has considered the various divisions of plaintiffs' petition and defendants' counter-claim. Each will be discussed briefly in turn to be followed by this Court's findings of fact and conclusions of law which are the basis for the decisions of the Court.

PLAINTIFFS' DIVISION I

Plaintiffs contend that the present 1964 temporary apportionment of the Iowa legislature should be declared invalid under the Bill of Rights of the Constitution of the State of Iowa. Defendants deny this allegation and further contend the issue is moot since the Three Judge Federal Court has already held the 1964 apportionment prospectively invalid.

The Court agrees with the defendants that any question of the constitutionality of the 1964 temporary apportionment plan is moot since the plan is already declared invalid under federal constitutional standards.

Since the Court finds the basic issue raised a moot one, there is no necessity to discuss the alleged reasons for further unconstitutionality advanced by plaintiffs.

PLAINTIFFS' DIVISION II

Plaintiffs contend that the present (1964) temporary apportionment of the Iowa legislature should be declared invalid because it is in violation of Section 1 of the Equal Protection Clause of the 14th Amendment of the Constitution of the United States.

Defendants deny this allegation and maintain that this is a moot issue since in February of 1965 the Three Judge Federal Court found the 1964 apportionment plan in violation of this section of the United States Constitution.

Since the basic question is moot, there is no need to consider other issues alleging further unconstitutionality raised by the plaintiffs.

PLAINTIFFS' DIVISIONS III AND V

These Divisions correspond to plaintiffs' Division I except that they attack the 1965 temporary or statutory apportionment plan for these reasons: (1) That it violates Article I of the Iowa Bill of Rights (2) That it provides for more than 50 senators (3) The population of the Polk County District is more than 19 times larger than that of Monona County District (4) The plan does not provide for subdistricting (5) The plan, because of lack of subdistricting, does not have a uniform operation among the districts with reference to number of representatives, population of districts, and length of ballot (6) Lack of subdistricting causes further lack of uniform operation since it encourages block voting, makes campaigning difficult, submerges minorities, and makes contact between legislators and constituents difficult.

Defendants deny these allegations.

Plaintiffs in this Division are attacking, as is certainly their perogative, the 1965 temporary apportionment because it allegedly violates the Iowa Constitution. First is the contention that the Three Judge Federal Court erroneously found Sections 34, 35 and 36 of Article III of the Iowa constitution unconstitutional in their entirety, rather than severing or reviving therefrom the 50 senator limitation. This Court holds that the Three Judge Federal Court was deciding a federal question (violation of the 14th Amendment of the U. S. Constitution) when it made this judgment and that this judgment on severability or revival was part and parcel of the federal decision made and was necessary to effectuate federal policy. Since this federal decision has been affirmed by the U. S. Supreme Court, it is binding on this Court.

Secondly, and in the alternative, this Court would hold that if this Court may properly re-examine the holding of the federal court that it should not do so at this time and should defer to the decision of the federal court on this judgment for all of the equitable reasons hereinbefore set out.

Thirdly, and again in the alternative, if this Court should consider the question on the merits, it would have to conclude that the Three Judge Federal Court was correct in its decision not to sever or revive any of the parts of Sections 34, 35 and 36 of Article III of the Iowa Constitution. Practically the federal court held that it was impossible to determine pertinent legislative intent at this time since when these acts were adopted no one could have anticipated the large shifts in population which have brought about apportionment problems.

A reading of the federal court's decision indicates that the doctrine of revival was strongly urged by the plaintiffs in that case, but rejected by a majority of the court because it was unsure of the application of revival upon the rather ambiguous provisions for the make-up of the Iowa House found in the original constitution. Judge McManus in a separate opinion in this case felt that revival would have been equally appropriate, but that the action taken by the majority was likewise an appropriate remedy to the situation confronting them. The cases are clear that legislative apportionment acts should be considered as a whole and that any small change in one house may well cause an imbalance that can make a whole plan unpalatable.

This Court would comment that the Three Judge Federal Court demonstrated a keen insight into the legislative problem presented to them by holding the three Sections invalid in their entirety. This permitted the Iowa

legislature to have the required amount of freedom in meeting federal constitutional standards without being hamstrung by numerical limitations and ratios placed on both the senate and house as would have been necessary if the revival theory had been adopted as urged by the plaintiffs in that case.

This Court then concurs with the action taken by the Three Judge Federal Court as affirmed by the U. S. Supreme Court with respect to the position taken on the questions of severability and/or revival in the striking down of Sections 34, 35 and 36 of Article III of the Iowa Constitution in order that federal constitutional standards might be met in Iowa apportionment.

There is then no requirement remaining in the Iowa constitution that the Iowa senate be composed of only 50 senators nor is there conversely any limitation on the number of members of the house as provided in earlier constitutional enactments.

Passing now to the question of subdistricting and the Iowa constitution.

Article III, Section 37, by its plain meaning and historical usage means exactly what it says: no county may be divided in forming a legislative district.

This being true, there can be no subdistricting of counties under the Iowa constitution. Further, this provision of the constitution, being a special provision and adopted by the people, cannot be found to be invalid by another general provision of the same constitution. Assuming arguendo that legislative subdistricting was permissive in Iowa, then is there a constitutional or statutory duty to subdistrict?

The Court finds none. To the contrary, at large multi-member elections in the legislature and for other governmental bodies is part of the Iowa heritage.

If this type of election causes a long ballot, difficult campaigning in urban areas, block voting and an injustice to areas where elections by single member districts are practiced, the Iowa courts have never found them constitutionally impermissible and this Court finds no persuasive reasons for doing so now under the constitution of Iowa. Classification by governmental bodies has long been judicially accepted in Iowa. The 1965 apportionment provides for apportionment by counties by population with no subdividing of counties. We see no unreasonable classification within those limitations.

PLAINTIFFS' DIVISION IV

This Division is a detailed attack upon the 1965 temporary or statutory apportionment plan based upon alleged discrimination contrary to Section 1 of the 14th Amendment to the Constitution of the United States. Briefly, plaintiffs make these allegations: (A) Polk County citizens vote for 11 legislators, single member districts for only one, (B) Polk County citizens vote for 5 senators, single member districts for only one, (C) Polk County residents do not have "identifiable constituencies", (D) The plan does not have a uniform operation and citizens in Polk County are deprived of equal protection of the laws, (E) At large elections result in block voting, (F) Multi-member districts operate to submerge minority groups, (G) Single-member district legislators have more personal contact with their constituents, (H) A citizen in Polk County can exert pressure on 11 different representatives, (I) A legislative candidate from Polk County for the house has 16 times more people to contact than

some other candidates for single-member districts, (J) A legislative candidate from Polk County for senate has 7 times more people to contact than some other candidates for single-member districts, (K) In Polk County the plan tends to minimize and cancel out the voting strength of political elements of the voting population, (L) Multi-member legislative districts tend to minimize and cancel out the voting strength of rural areas in urban counties and also to minimize and cancel out the voting strength of political elements of the voting population.

Defendants deny these allegations.

At issue in this Division is the constitutionality of at large elections in multi-member legislative districts under the federal standards. This is not a new issue. It was raised before the Three Judge Federal Court by a representative of a small Iowa county and decided by that Court in February of 1965 adversely to that representative. In that case the issue of a Polk County resident voting for 11 representatives and another Iowa citizen only voting for one was squarely presented to the court and decision made on this federal question by a federal court. Briefly the U. S. Supreme Court, Reynolds v. Sims, 377 U.S. 533, and Toombs v. Fortson, 241 Federal Supplement (1965), and Davis v. Cameron (S.D. Iowa February, 1965) have laid to rest any possible claim that at large multi-member legislative districts are *per se* unconstitutional. If multi-member districts are per se constitutional then arguments based on difference in number of candidates, differences in campaigning and knowing constituents and exerting pressure and the possibility of block voting are all inherent in a system of at large elections in multi-member legislative districts and are no basis for a finding of unconstitutionality. Plaintiffs it is believed "hang their hat" on the language in Toombs v. Fortson (supra) in

which the U. S. Supreme Court specifically indicated it was not passing on multi-district legislative schemes which "operate to minimize or cancel out the voting strength of racial or political elements of the voting population".

We suspect the U. S. Supreme Court in this language may have had in mind a situation comparable to the Pennsylvania reapportionment where the legislature set up some subdistricted counties and placed others of a similar size in at large multi-member districts depending, of course, on what was most advantageous to the political party then in public favor. (Drew v. Scranton). The U. S. Supreme Court vacated the federal district court judgment, (379 U.S. 40, November, 1964).

The United States Supreme Court in affirming Mann v. Davis (245 F.Supp. 241, 1965), made it very clear that it did not intend to have this restriction applied to apportionate plans set up in a rational, uniform manner even though some minority group might have elected a representative if there had been a different form of apportionment.

In this case two counties were joining together in Virginia and eight legislators elected from the two counties on an at large basis. There was a negro protest on the theory that if there was a different apportionment scheme, a negro might have been elected. This assumption was based on the number of negroes in a particular area. The United States Supreme Court did not agree. Factually, this situation is strikingly similar to the allegations of plaintiffs herein. Plaintiffs contend that if there had been subdistricting one or more Republican legislative candidates might have been elected in Polk County and possibly also a candidate from the rural portion of Polk County.

The Court finds these assertions speculative at best, but even if true would not be a basis for a finding of federal unconstitutionality.

Apportionment under the 1965 temporary plan is by counties and by population with no subdistricting in any county. There is no evidence of any intentional maneuvering of these simple and widely used guideposts to submerge minorities of any type. Members of both political parties were elected to the 1965 legislature in at large elections in multi-member districts as were both urban and rural residents.

This Court finds that the Polk County voters who voted for the defeated Republican legislative candidates in 1964 were not victims of a system that minimized or cancelled out their voting strength any more than the Linn County voters who voted for the defeated Democratic candidate for the state senate in 1964.

This Court finds that the plaintiffs have offered no evidence to show that the 1965 temporary apportionment is either per se unconstitutional or that its operation will tend to minimize or cancel out voting strength of political elements.

PLAINTIFFS' DIVISION VI

This division attacks the holding by the Three Judge Federal Court that Section 37, Article III of the Iowa Constitution is severable from Sections 34, 35 and 36 of the same Article which the Three Judge Federal Court found unconstitutional in their entirety and which decision was later affirmed by the U. S. Supreme Court.

This Court holds that this decision by the Three Judge Court was part and parcel of a judgment on a federal constitutional question which has been affirmed by the

U. S. Supreme Court and this Court is bound by this holding on a federal question.

In the alternative this Court holds that if it were proper for it to readjudicate this question, it would still defer to the holding of the federal court for all the equitable reasons urged heretofore in this decision.

Finally and again in the alternative, if this question were to be considered by this Court and on the merits it would hold as did the federal court that constitutional apportionment could be had without declaring this section unconstitutional and it was thus severable. If the 1965 temporary apportionment is federally constitutional as this Court believes, then the Three Judge Federal Court was obviously correct in its decision.

This Court would note in passing that plaintiffs appear to take contradictory positions on severability.

Their arguments on the severability of the 50 member senate constitutional provision are necessarily at war with their arguments on the severability of Section 37.

PLAINTIFFS' DIVISION VII

This Division appears to be a combination of plaintiffs' Divisions I, II, III, IV, and V and the points raised therein have already been covered by this opinion.

DEFENDANTS' COUNTER-CLAIM

Defendants, by way of counter-claim, ask for a declaratory judgment adjudging Senate File 568, Acts of the 61st General Assembly (1965 temporary or statutory apportionment plan) to be a constitutionally valid interim plan of apportionment.

This Court for all of the equitable reasons heretofore urged is inclined to find the 1965 apportionment plan argu-

ably close to constitutional standards so that it may be approved as an *interim* plan of apportionment.

The Court is not unmindful of the larger than 2 to 1 disparities in legislative districts existing in the house of representatives, but finds this factor balanced by the general overall equality of representation of the plan.

It should be remembered that "one-man, one-vote" is the goal and it is expected that future legislatures will strive toward that end.

In arriving at the conclusions hereinbefore set out this Court has made the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

(1) That neither house of the Iowa legislature in recent times has been apportioned on a substantially population basis until a Three Judge Federal Court made an order requiring at least one house to be so apportioned as a result of a class action filed by two Polk County, Iowa, residents in August of 1962.

(2) That the apportionment of the 1965 Iowa legislature whose make-up was specified by a 1964 special session of the prior Iowa legislature called in compliance with the order of the Three Judge Court (supra) was held to be prospectively invalid by the same court in February of 1965.

(3) That the 1965 Iowa legislature upon its apportionment being declared prospectively invalid enacted a new statutory or interim apportionment plan which provides for greater population representation in the senate but leaves the house districts unchanged.

(4) That both statutory plans were adopted by the Iowa legislature in conformity with the Court's order which each time left intact the Iowa constitutional provision (Article III, Section 37) which the Three Judge Court described in its opinion each time as prohibiting the subdistricting of counties for legislative districts.

(5) That apportionment legislation is universally recognized as difficult legislation since it involves political issues including many times the very political lives of the enactors.

(6) That the Iowa State legislature in enacting both interim or statutory apportionment measures made good faith efforts to comply with the orders of the Three Judge Court.

(7) Counties or groups of counties have been used as the basic units for apportionment legislation in Iowa since 1846.

(8) Multi-member legislative districts with members to be elected at large have been present to some degree in every Iowa legislative apportionment since 1846.

(9) The Iowa constitution has been read by lawyers, judges, political scientists, and legislators according to its plain meaning since 1846 so as to prohibit subdistricting of counties in the formation of legislative districts.

(10) Political scientists, lawyers, and politicians disagree as to the relative merits of multi-member legislative districts, subdistricting, and combinations of the two methods of representation.

(11) The probability of partisan gerrymandering and mechanical problems arising from shifting population within a county are the principal general arguments advanced against subdistricting within a county.

(12) The difficulty of campaigning in a populous county, confusion caused by long ballots, and the alleged difficulty of personal contact between legislators and constituents both before and after election are principal arguments against at large elections in multi-member legislative districts.

(13) That at large voting for multiple members of school boards and city councils is and has been widely prevalent in the governmental structure of the political subdivisions of Iowa.

(14) That the Iowa legislature in complying with the court's order to give additional weight to the population factor in apportioning itself, each time met the problem by increasing the size of its membership.

(15) That the legislature's solution of adding members to meet federal constitutional requirements per se increased the number of legislators to be elected at large from multi-member districts.

(16) That one election has been held under the 1964 interim or statutory apportionment, but no further elections will be held under it since it has been declared to be prospectively invalid and replaced by the 1965 interim or statutory apportionment plan.

(17) That no election has yet been held under the 1965 interim or statutory apportionment plan. Evidence of alleged or prospective discrimination under it, if any, comes of necessity from its specific language or from speculation that the 1964 election patterns and problems will be duplicated in the 1966 election campaign since it does provide for at large elections in multi-member legislative districts as did the 1964 plan.

(18) That the 1964 election in Iowa resulted in a landslide victory for the national and state Democratic ticket which made the Democratic party the majority party in the Iowa legislature for the first time in about three decades.

(19) That the 1964 Democratic landslide was particularly complete in Polk County. The Democratic candidate for governor carried the county by a 4 to 1 margin and no Republican legislator was elected from Polk County.

(20) That candidates for the legislature in Polk County in 1964, as in previous elections, had more people to contact in their campaign and more people to serve in the legislature, if elected, since Polk County is the most populous county in the State of Iowa.

(21) That residents of Polk County had more legislative candidates to consider and vote for in 1964 since they were residents of the most populous county in the State of Iowa and under court-ordered federal constitutional population standards they were entitled to representation in the state legislature commensurate with the population of their county.

(22) That no specific or competent evidence was presented by plaintiffs as to any alleged difficulties and/or discrimination resulting from either the 1964 or 1965 interim or statutory apportionment in 96 of Iowa's 99 counties.

(23) That there was some evidence presented by plaintiffs and denied by defendant with reference to some individuals experiencing difficulties in campaigning, lobbying and meeting constituents under the 1964 apportionment plan in Polk County. There was, however, no

evidence presented of discrimination, either purposeful or otherwise, among candidates or voters in Polk County in the selection of legislative representatives.

(24) There was fragmentary and secondary evidence presented by plaintiffs as to some difficulty of campaigning by legislative candidates in Linn County in the 1964 election. There was, however, no evidence presented of discrimination, either purposeful or otherwise, among legislative candidates or voters in Linn County in the selection of legislative representatives.

(25) That plaintiff's evidence purporting to show that rural interests were being submerged in Polk County and Black Hawk County by at large voting in the 1964 election is offset by evidence concerning Linn County that rural legislative candidates were successful out of proportion to their numbers in the 1964 at large election in that county. In the face of this conflict on a sample of only two counties, the Court judicially notes that over the years in at large elections in multi-member legislative districts there has been no monopoly by either urban or rural legislators in winning elections. The Court therefore finds that there is no competent evidence in the record to substantiate plaintiffs' assertion that rural minorities are being submerged by the lack of subdistricting, there being additionally no competent evidence that urban or rural legislators within a county did not or do not represent all of their constituents without discrimination, in the Iowa statutory or interim apportionment plans.

(26) There is no competent evidence in the record to show that political minorities are being submerged by at large voting, plaintiffs' own testimony being that members of both major political parties were elected to the legislature from Linn County which negatives any possible

presumption arising from the election of all Democratic legislative candidates in Polk County and there being no such showing from any of the other 97 counties in Iowa.

(27) There is no competent evidence that some members of a political party might have won an election in 1964, or possibly win one in 1966, if the district boundaries had been or are different, such evidence being patently speculative in nature. In this respect there is no way of determining which candidates receive which voter's votes or stated another way whether registered Republicans vote for all Republicans in a general election or vice versa for registered Democrats.

(28) That there is no evidence that any discrimination, purposeful or otherwise, was practiced by the Iowa state legislature in setting up legislative districts in either statutory or interim apportionment plan since the districts were based on historical and constitutional political subdivisions.

(29) That there is no substantial evidence that the 1964 interim or statutory apportionment plan did not work reasonably well as a temporary apprtionment plan for all of the citizens of Iowa.

(30) That the 1965 interim or statutory apportionment plan is an improvement over the 1964 plan with reference to population standards in the senate and can reasonably be expected to work reasonably well as a temporary apportionment plan.

(31) That the proposed constitutional amendment with reference to apportionment passed for the first time in 1965 provides for permissive subdistricting and smaller numbers of legislators in both houses which will eventually diminish, if not eliminate, the objections raised by plaintiffs to the statutory apportionment.

(32) That the Three Judge Federal Court has since 1963 directed the Iowa legislature with restraint and only deliberate speed in proceeding toward constitutional apportionment in Iowa exercising equitable abstention frequently to permit orderly legislative action in performing legislative functions in this regard.

(33) That as a matter of equity, this Court should interfere with the orderly apportionment progress being made in Iowa only under the most compelling circumstances. That the record is devoid of any compelling circumstances which warrants the equitable intervention of this Court in this process which is proceeding in a generally satisfactory and orderly fashion.

(34) That under the interim or statutory apportionment plan, all the people in Iowa who qualify as registered voters can vote for members of the state legislature substantially in accordance with the population of the county or group of counties in which they reside and the weight of their vote is not to be diluted because of their place of residence.

(35) That the 1965 statutory or interim apportionment plan comes reasonably close to providing for substantial population equality among legislative districts and provides for a reasonable classification of legislative districts being based on political subdivisions, counties/or group of counties.

(36) That no useful purpose to the State of Iowa would be served by requiring a special session of the Iowa legislature at this time to require greater numerical equality among legislative districts.

(37) That it is in the best interests of the State of Iowa if the expenses of a special session of the Iowa legislature can be avoided.

(38) That legislative districts should be as nearly equal in population as possible and "one-man, one-vote" should be the goal for the Iowa legislature. However, the 1965 Iowa interim or statutory apportionment is arguably close to this standard.

(39) That it is therefore in the best interests of the State of Iowa if the 1965 interim or statutory apportionment is approved by the Court as an *interim plan of apportionment* and this court should so find.

CONCLUSIONS OF LAW

1. That plaintiffs have the burden of proof and have failed to sustain this burden in any of the Divisions of their petition.

2. That Divisions I and II of plaintiffs' petition attacking the constitutionality of the 1964 temporary apportionment raise moot questions since this plan has already been declared invalid by the Three Judge Federal Court.

3. That the 1965 temporary apportionment plan does not violate the Bill of Rights of the Constitution of the State of Iowa.

4. That there is a strong presumption of constitutionality of constitutions and statutes. The plaintiffs have not overcome this strong presumption by presenting evidence of the wisdom of alternative apportionment plans or by pointing out hardships in campaigning or by evidence that it does not create perfect equality.

5. That the Iowa legislature has the power to reasonably classify.

6. That equal protection of the law requires that all laws affect all persons equally when similarly situated.

7. That multi-member districts in and of themselves have never been held unconstitutional.

8. That classification of legislative districts by counties or groups of counties is not an unreasonable or arbitrary classification.

9. That Article III, Section 37, of the Iowa Constitution, by its plain language prohibits the subdistricting of counties in the formation of legislative districts.

10. That the Three Judge Federal Court in finding the apportionment of the Iowa legislature invidiously discriminatory and in violation of the 14th Amendment to the U. S. Constitution and striking down Sections 34, 35 and 36 of Article III of the Iowa Constitution in its entirety while finding Section 37 of the Iowa Constitution to be severable and valid was deciding a federal question and the question of severability of Section 37, Article III of the Iowa Constitution was part and parcel of this federal judgment of the application of the 14th Amendment of the U. S. Constitution to the Iowa apportionment system. That this decision on a federal constitutional question was appealed to the U. S. Supreme Court and was affirmed and is binding on this Court.

11. That in the alternative if this Court were to decide that the question of severability of Section 37, Article III is properly before this Court as an interpretation of the State Constitution on which state Courts are finally determinative then this Court should as a matter of equity defer to the two year old judgment of the Three Man Federal Court since the Iowa legislature has twice acted in good faith upon such finding of the Court; that such good faith reliance has resulted in improved apportionment for the State of Iowa which substantially meets federal constitutional standards; that an equity court should

strongly consider in deferring to the judgment of the federal court the improvement in apportionment in Iowa which has been achieved thus far in an orderly fashion with each branch of the government, judicial, legislative, and the executive acting properly and promptly within its sphere of authority and that partisan wrangling, judicial apportionment, and state-wide at large elections for state legislature such as has occurred in other states has not developed in Iowa.

12. That again in the alternative if this Court were to decide the question of severability of Section 37, Article III, on its merits, the decision would of necessity be that such section is severable since it has been possible to formulate an apportionment plan which substantially meets federal constitutional standards and still comply with Section 37, Article III.

13. That there is no revival of any part of the Iowa Constitution and specifically the 50 member limitation on the Iowa senate does not survive.

14. That the Three Judge Federal Court in finding the apportionment of the Iowa legislature invidiously discriminatory and in violation of the 14th Amendment to the U. S. Constitution and striking down Sections 34, 35 and 36 in their entirety and that no previous comparable sections or parts thereof were revived was deciding a federal question and these questions were part and parcel of this federal judgment of the application of the 14th Amendment of the U. S. Constitution to the Iowa apportionment system. That this decision on a federal constitutional question was appealed to the U. S. Supreme Court and affirmed and is binding on this Court.

15. That in the alternative if this Court were to decide that the question of revival is properly before this

Court as an interpretation of the state constitution on which state courts are finally determinative then this Court should as a matter of equity defer to the two year old judgment of the Three Man Federal Court since the Iowa legislature has twice acted in good faith upon such finding of the Court; that such good faith reliance has resulted in improved apportionment for the State of Iowa which substantially meets federal constitutional standards; that an equity court should strongly and properly consider in deferring to the judgment of the Three Man Federal Court that improved apportionment in Iowa has thus far been achieved in an orderly fashion with each branch of the government, judicial, legislative, and executive acting properly and promptly within its sphere of authority and that partisan wrangling, judicial apportionment, and state-wide at large elections for the legislature have not developed in Iowa.

16. That again in the alternative if this Court were to decide the question of revival on its merits that its decision, of necessity, would be that the remedy of revival is not appropriate under the instant circumstances for these reasons: (1) There is no legislative intention discernible to imply revival was intended under these circumstances brought on by shifting populations not apparent or predictable when the constitutional provisions were originally enacted, (2) That the application of revival would have complicated statutory apportionment if applied in its full scope to also apply to the revival of the house of representatives provided for in the original Iowa Constitution and (3) Apportionment legislation must be considered as a whole since a small change in one house may well throw the entire apportionment scheme out of balance.

17. That Article III, Section 37, of the Iowa Constitution cannot be declared unconstitutional under the Iowa constitution.

18. That it is a general rule in construing a constitution that the special provision is given effect over the general provision.

19. That the concept of "one-man one-vote" as enunciated by the U. S. Supreme Court in June of 1964 is not an ancient principle and was not contemplated by the Iowa Bill of Rights at least as late as Selzer vs. Synhorst, a 1962 decision of the Iowa Supreme Court which approved as constitutional an apportionment plan for the Iowa legislature in which neither house was remotely close to the "one-man one-vote" principle.

20. That a state court does not have the power to declare a section of the state constitution unconstitutional.

21. That in following Article III, Section 37, of the Iowa constitution, and thereby not providing for subdistricting counties, the 61st General Assembly of the Iowa legislature has provided an interim plan which is valid under the Iowa and federal constitutions.

22. That so long as a state's system of legislative apportionment meets the test of substantial equality of population among the various legislative districts, to have or not to have multi-member districts is a matter of civic taste to be determined in each state by the political majority in control.

23. Article III, Sections 34, 35 and 36 of the Iowa Constitution as they existed in 1964, and as they originally existed in 1857, are inseparable and must be considered together and they must be valid or invalid together.

24. That Article III, Section 37, of the Iowa Constitution, is a formulation of one of the basic ideas of Iowa government that county lines shall be the divisions of the representative units in the state legislature; that this

is not part of the framework of an apportionment plan but rather a separate principle which has not changed for 119 years while Iowa apportionment plans have.

25. That the 1965 temporary apportionment plan arguably meets the constitutional requirements of equal voting rights primarily based on a population principle.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petition of the plaintiff and each Division thereof is dismissed at plaintiffs' costs,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as a matter of declaratory judgment requested in defendants' counter-claim the 1965 temporary apportionment plan (Senate File 568, Acts of the 61st General Assembly of the State of Iowa) is approved and declared constitutional as an interim plan of apportionment.

/s/ Harry Perkins
Judge

Dated and signed in Des Moines, Iowa, of this 5th day of November, 1965.

APPENDIX B

IN THE SUPREME COURT OF IOWA

ELIZABETH KRUIDENIER, ROBERT R. RIGLER, LaMAR FOSTER, Sr., and THOMAS S. HEFLEY,
Appellants,

v.

W. E. McCULLOCH, Auditor of Polk County, Iowa, and HAROLD E. HUGHES, Governor of State of Iowa, GARY L. CAMERON, Secretary of State, LORNE R. WORTHINGTON, State Auditor, PAUL FRANZENBURG, State Treasurer, KENNETH E. OWEN, Secretary of Agriculture, in their elective capacities and also collectively and individually as the Executive Council of the State of Iowa, and LAWRENCE F. SCALISE, Attorney General, and ROBERT D. FULTON, Lieutenant Governor,
Appellees.

(Filed)
April 15,1966)
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APPEAL FROM POLK DISTRICT COURT.
HARRY PERKINS, JUDGE.

Class action in equity attacking the constitutionality of the temporary reapportionment plans adopted by the Sixtieth and Sixty-first General Assemblies of Iowa, resulted in dismissal of plaintiffs' petition and decree declaring 1965 temporary or statutory apportionment plan to be a constitutionality valid interim plan of apportionment. Plaintiffs appeal.—Affirmed in part and reversed in part.

David W. Belin of Herrick, Langdon, Sandblom & Belin, of Des Moines, for appellants.

Lawrence F. Scalise, Attorney General, and Timothy McCarthy, Solicitor General, for appellees.

PER CURIAM

The following opinion of Justice Mason, except for Divisions IX and XII and certain statements in Division XIII related thereto, is adopted as the opinion of the court with all justices concurring therein, except that Justice Larson dissents from Division X of the opinion.

The opinion of Justice Stuart is adopted as the opinion of the court in lieu of said Divisions IX and XII and certain statements in said Division XIII related thereto.

Chief Justice Garfield and Justices Larson, Snell and Moore concur in the opinion of Justice Stuart.

Divisions IX and XII, and the statements related thereto in Division XIII of the opinion of Justice Mason, are a dissent to the opinion of Justice Stuart, with Justices Thornton, Rawlings and Becker joining therein.

MASON, J.—This suit was instituted by appellants, citizens and qualified voters of Cedar, Chickasaw and Polk County, one a state senator, another a representative, as a class action in their own behalf and in behalf of other Iowa voters similarly situated. Defendants are state and county officials charged with performing various duties in connection with conducting elections in Iowa.

Plaintiffs' petition, as amended, in seven divisions, attacks the constitutionality of the temporary reapportionment plans adopted by the Sixtieth, special session (Senate File 1, chapter 1) and Sixty-first (Senate File 568, chapter 88) General Assemblies as in violation of sections 1, 2 and 6 of Article I of the Iowa Constitution and the equal protection clause of section 1 of Amendment 14 to the United States Constitution. Constitutional questions

are raised as to sections 34, 35, 36 and 37 of Article III of the Iowa Constitution and as to multi-member districts. The relief sought is to obtain an adjudication the plans referred to are unconstitutional.

Defendants, by way of counterclaim, ask for declaratory judgment adjudging Senate File 568, Acts of the Sixty-first General Assembly (1965 temporary or statutory apportionment plan), to be a constitutionally valid interim plan of apportionment.

Trial to the court resulted in decree dismissing plaintiffs' petition and declaratory judgment declaring constitutional Senate File 568, Acts of the Sixty-first General Assembly, as an interim plan of apportionment. Plaintiffs appeal.

This is the second appeal in this case. See Kruidenier v. McCulloch, 257 Iowa , 136 N.W. 2d 546, which reversed the sustaining of defendants' special appearance and remanded the cause for trial.

I. The 1965 temporary reapportionment plan fixed the number of senators at 61 and apportions them in districts whereby each district has one senator except Polk County, which constitutes the 20th district, with five senators to be elected at large, except Black Hawk County (32nd district) and Linn County (24th district) each with three senators to be elected at large, and the following counties, each constituting separate districts, with two senators to be elected at large: Dubuque County (30th district); Pottawattamie County (13th district); Scott County (15th district) and Woodbury County (37th district).

The plan provides that the House of Representatives "shall be apportioned on a population basis." Forty-six counties would each comprise one district and each elect

one representative, 17 additional districts are comprised of two counties each with each district entitled to one representative, and the counties of Louisa and Muscatine are combined into a single district with two representatives to be elected at large. In addition, said 1965 temporary reapportionment plan provides the counties of Cerro Gordo, Webster, Story, Jasper, Johnson, Clinton, Wapello, Marshall, Des Moines and Lee shall comprise one district each and each shall elect two representatives; Dubuque County shall comprise one district and shall elect three representatives; Pottawattamie County shall comprise one district and shall elect four representatives; the counties of Scott, Woodbury and Black Hawk shall comprise one district each and each shall elect five representatives; Linn County shall comprise one district and shall elect six representatives; Polk County shall comprise one district and elect eleven representatives.

II. The 1904 amendments (Article III, sections 34, 35 and 36) provided for express repeal of the same sections in the Constitution of 1857. Article III, section 34, as then amended, provides:

"The Senate shall be composed of fifty members to be elected from the several senatorial districts, established by law and at the next session of the general assembly held following the taking of the state and national census, they shall be apportioned among the several counties or districts of the state, according to population as shown by the last preceding census."

Article III, section 35, as amended, provides:

"The House of Representatives shall consist of not more than one hundred and eight members. The ratio of representation shall be determined by dividing the whole number of the population of the state as shown by the last

preceding state or national census, by the whole number of counties then existing or organized, * * *"

Article III, section 36, as amended, provides:

"The General Assembly shall, at the first regular session held following the adoption of this amendment, and at each succeeding regular session held next after the taking of such census, fix the ratio of representation, and apportion the additional representatives, as herein before required:"

The 1928 amendment contained no such repealer and dealt with only one section of the apportionment provisions (section 34) by adding thereto the words "but no county shall be entitled to more than one (1) senator".

Senate File 1 (the 1964 temporary reapportionment plan) was repealed by Senate File 568 (the 1965 temporary reapportionment plan) which was enacted as chapter 88, Laws of the Sixty-first General Assembly, June 3, 1965, after this action was commenced.

III. Divisions I and II of plaintiffs' petition allege the 1964 temporary reapportionment plan of the Iowa legislature should be declared invalid under sections 1, 2 and 6 of Article I of the state constitution and as in violation of the equal protection clause of section 1 of Amendment 14 of the Constitution of the United States because the plan provides that senators and representatives be elected at large from certain districts including the district of Polk County.

Divisions III and IV correspond to Divisions I and II except they attack the 1965 temporary apportionment plan as invalid under the state and federal constitutions because the plan does not have a uniform operation and grants to certain citizens or classes of citizens within the

state of Iowa, privileges or immunities which, upon the same terms, shall not equally belong to all citizens in that said plan provides for senators to be elected at large from certain districts including the district of Polk County. The issue plaintiff urges is the constitutionality of at-large elections in multi-member districts.

Division V asserts the method of apportionment of the Senate of the state of Iowa established by the original constitution of the state as amended in 1904 and prior to the Amendment of 1928 is constitutional; the Amendment of 1928 that added to section 34, Article III, the phrase, "no county shall be entitled to more than one (1) senator", is unconstitutional; and therefore the apportionment of the Iowa Senate is governed by the provisions of the 1904 amendment, Article III, section 34, which apportions the Senate on the basis of population and further declares that "the Senate shall be composed of fifty members"; the 1964 and the 1965 temporary reapportionment plans, each of which provides for more than 50 senators, are therefore unconstitutional.

Division VI is in the alternative and prays that the court find sections 34, 35, 36 and 37 of Article III of the Constitution of Iowa are each and all inseparable, that the provisions for apportionment found in said Article are invidiously discriminatory and therefore unconstitutional and void and the 1964 and 1965 temporary reapportionment plans do not have a uniform operation because they do not provide for subdistricting and are therefore unconstitutional. In this division plaintiffs attack the holding of the three-judge federal court that section 37, Article III, of the Iowa Constitution, is severable from sections 34, 35 and 36 of Article III.

Division VII is a combination of the prior provisions asking the court find the existing reapportionment plans

unconstitutional because they do not provide for subdistricting and because they provide for a Senate of more than 50 members.

Briefly, plaintiffs make these allegations: (A) Polk County citizens vote for 11 legislators, single-member districts for only one, (B) Polk County citizens vote for five senators, single-member districts for only one, (C) Polk County residents do not have "identifiable constituencies", (D) The plan does not have a uniform operation and so citizens in Polk County are deprived of equal protection of the laws, (E) At-large elections result in block voting, (F) Multi-member districts operate to submerge minority groups, (G) Single-member district legislators have more personal contact with their constituents, (H) A citizen in Polk County can exert pressure on 11 different representatives, (I) A legislative candidate from Polk County for the House has 16 times more people to contact than some other candidates for single-member districts, (J) A legislative candidate from Polk County for the Senate has seven times more people to contact than some other candidates in single-member districts, (K) In Polk County the plan tends to minimize and cancel out the voting strength of political elements of the voting population, (L) Multi-member legislative districts tend to minimize and cancel out the voting strength of rural areas in urban counties and minority political elements of the voting population.

IV. Other cases attacking the various apportionment plans of the legislature commenced in the United States District Court for the Southern District of Iowa are: Davis v. Synhorst, 217 F. Supp. 492 (1963), 225 F. Supp. 689 (1964), (affirmed, Hill v. Davis, 378 U.S. 565, 84 S. Ct. 1918, 12 L. Ed. 2d 1037), 231 F. Supp. 540 (1964), Davis v. Cameron, 238 F. Supp. 462 (1965).

V. Defendants' answer denies the claim of discrimination, urges plaintiffs' action is not timely brought, asserts the questions in Divisions I and II are moot by reason of the decision of the three-judge federal court in Davis v. Cameron, supra, contends section 37 of Article III of the state constitution prohibits the dividing of counties and said Article cannot be declared to be unconstitutional under the state constitution. Defendants deny the 1965 temporary plan is in violation of the equal protection clause of section 1, Amendment 14 of the federal constitution, contend the judgment in Davis v. Synhorst, supra, affirmed by Hill v. Davis, supra, declares sections 34, 35 and 36 of Article III as invidiously discriminatory and declared to be prospectively null and void and inoperative for all future elections to the general assembly of the state of Iowa, except elections to fill the vacancies in the present general assembly. They assert the decision of the three-judge federal court, which plaintiffs contend is erroneous, has been affirmed by the United States Supreme Court in Hill v. Davis, supra. In answer to Division VII defendants incorporate much of their prior answer in order to place at issue the matters alleged therein.

VI. Plaintiffs assign as propositions relied on for reversal: (1) The trial court erred in failing to hold single-member districts in the Iowa legislature are required by Article I, section 6 of the state constitution. (2) The 1964 and 1965 temporary reapportionment plans which respectively provide for 59 and 61 senators are unconstitutional as in violation of section 34, Article III of the state constitution; in the alternative, sections 34, 35, 36 and 37 of Article III are inseparable and where three of these provisions have been held federally unconstitutional, the fourth must also fall and the trial court erred

in holding to the contrary on both of these alternatives. (3) The trial court erred in failing to hold the multi-member constituency apportionment scheme of the 1964 and 1965 temporary reapportionment plans violates the equal protection clause of section 1, Amendment 14 of the federal constitution.

VII. Plaintiffs assert in a brief point under their first proposition that uniform operation of laws and equality of privileges and immunities require that every Iowa voter is equal to every other Iowa voter when he casts his ballot in an election for state senator or state representative, there is no state constitutional prohibition against subdistricting, Article I, section 6, requires single-member districts in the Iowa legislature and they assert the temporary reapportionment plan which provides for multi-member districts and single-member districts in each house of the legislature violates this particular section of the Bill of Rights of the State constitution which provides:

"All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." That single-member districts in the Iowa legislature are required by this section and that the trial court erred in holding to the contrary.

VIII. We will first consider plaintiffs' contention that there is no constitutional prohibition against subdistricting, which presents the question: May a county be divided to form two or more senatorial or representative districts, each of them to be totally within such county? Answering the question involves an interpretation of the state constitution, and in this field we are the final arbiter. Kruidenier v. McCulloch, 257 Iowa , 136 N.W. 2d 546,

548, and citations; United Gas Pipe Line Company v. Ideal Cement Company, 369 U.S. 134, 135, 82 S. Ct. 676, 677, 7 L. Ed. 2d 623. When there is an unavoidable conflict between the federal and a state constitution, the supremacy clause of course controls. Reynolds v. Sims, supra, 377 U.S., at 584, 84 S. Ct., at 1393.

Article III, section 37, as it now exists, which was the same in the 1846 Constitution as Article III, section 32, provides:

"When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district."

Defendants assert and the trial court held this provision prohibits subdividing a county in forming a senatorial or representative district wholly within that county, i.e., what is commonly called subdistricting. Plaintiffs contend, however, section 37 prohibits only dividing a county and attaching the divided part to all or part of another county or other counties in forming a legislative district. Otherwise stated, the contention is that section 37, supra, does not proscribe establishing more than one district within a single county so long as it is not combined with territory outside the county.

We think the construction of section 37 for which plaintiffs contend is the more reasonable and hence adopt it. There is no division of a county within the meaning of this section as long as a senatorial or representative district is entirely within a specific county. Only if a senatorial or representative district were to take in a portion of two or more counties would there be a "divided" county in the formation of a district which is prohibited

by this section. It is our duty to harmonize this section, if fairly possible, with other provisions of our state constitution, particularly, as applied to the present controversy, section 6, Article I thereof, providing for uniformity and equality in legislative enactments. 16 Am. Jur. 2d, Constitutional Law, sections 66, 67. The construction we give section 37, Article III, supra, gives full effect to both these provisions.

Further, if section 37, Article III, were construed to prohibit subdistricting of a single county where such subdistricting is necessary to provide equal protection of the laws, it would not only conflict with section 6, Article III, of our state constitution but it would violate the equal protection clause of section 1 of Amendment 14 of the federal constitution. Since the federal constitution is, of course, supreme, such a construction of section 37 would render it of no effect. McCulloch v. Maryland, 4 Wheat (U.S.) 316, 426, 4 L. Ed. 579, 606; 16 Am. Jur. 2d, Constitutional Law, section 54, page 226.

It is a fundamental rule of statutory construction that where a statute is fairly open to two constructions, one of which will render it constitutional and the other unconstitutional or of doubtful constitutionality, the construction by which it may be upheld will be adopted. Mechanicsville v. State Appeal Board, 253 Iowa 517, 527, 111 N.W. 2d 317, 323, and citations; Jacobs v. Miller, 253 Iowa 213, 218, 111 N.W. 2d 673, 676; Kerr v. Chilton, 249 Iowa 1159, 1166, 91 N.W. 2d 579, 584, and citations; 16 C.J.S., Constitutional Law, section 98b, pages 375, 376.

A like rule fully applies in construing a provision of a state constitution. If fairly possible, it will be construed so it does not violate a provision of the federal constitution. 16 Am. Jur. 2d, Constitutional Law, section 67, page

246, states: "* * * where a provision of a state constitution is capable of two constructions, one of which would be in conflict with the Federal Constitution, the other must be adopted." Under the construction we give section 37, Article III, of our own constitution there is no violation of the equal protection clause of Amendment 14.

IX. We next combine for consideration plaintiffs' contention single-member districts are required by section 6, Article I, of the state constitution and their third proposition the multi-member constituency apportionment scheme of the temporary reapportionment plan violates section 1, Amendment 14 of the federal constitution.

After Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, was decided on March 26, 1962, the Supreme Court on June 15, 1964, decided Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, furnishing guidelines for apportionment in state legislatures.

The same day the Supreme Court announced its decisions in the following cases: WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S. Ct. 1418, 12 L. Ed. 2d 568; Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 84 S. Ct. 1429, 12 L. Ed. 2d 595; Davis v. Mann, 377 U.S. 678, 84 S. Ct. 1441, 12 L. Ed. 2d 609; Roman v. Sincock, 377 U.S. 695, 84 S. Ct. 1449, 12 L. Ed. 2d 620; Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632. With Reynolds the cases deal with the states of Alabama, New York, Maryland, Virginia, Delaware and Colorado.

As a basic constitutional standard the equal protection clause requires seats in both houses of a bicameral state legislature be apportioned on a population basis. An individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substan-

tial fashion diluted when compared with votes of citizens living in other parts of the state. Reynolds v. Sims, 377 U.S. 533, 568, 84 S. Ct. 1362, 1385.

By holding as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the equal protection clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement. Reynolds v. Sims, 377 U.S. 533, 577, 84 S. Ct. 1362, 1389-1390.

We reject the contention that formation of single-member districts is necessarily required by either section 6, Article I, of the state constitution, or section 1, Amendment 14, of the federal constitution. See in support Reynolds v. Sims, supra; Lucas v. Colorado General Assembly, supra, 377 U.S., at 731, n. 21, 84 S. Ct., at 1471, n. 21, where the court said, "We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective," and the following statement from Fortson v. Dorsey, 379 U.S. 433, 85 S. Ct. 498, 500:

"Only last term, in our opinion in Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, decided after the decision below, we rejected the notion that equal protection necessarily requires the formation of single-member districts. In discussing the impact on bicameralism of the equal-protection standards, we said, 'One body could

be composed of single-member districts while the other could have *at least some* multimember districts' 377 U.S., at 577, 84 S. Ct., at 1389. Again, in holding that a state might legitimately desire to maintain the integrity of various political subdivisions, such as counties, we said: 'Single member districts may be the rule in one state, while another state might desire to achieve some flexibility by creating multimember or floterial districts. *Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state.*' 377 U.S., at 579, 84 S. Ct., at 1390."

The creation of multi-member districts is not in itself a violation of either section 6, Article I, of the state constitution or section 1, Amendment 14, of the federal constitution. Fortson v. Dorsey, supra; Reynolds v. Sims, supra. However, we do recognize in a proper case there might be discrimination. Both Lucas and Fortson, supra, give recognition to some of the objections to multi-member districts. It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. A legislative scheme which creates single-member districts and multi-member districts in an arbitrary manner would be objectionable. In the absence of any reasonable explanation or justification (historical or otherwise), such districting might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious. Butcher v. Bloom, 203 A. 2d 556, 573.

In Lucas, supra, under the plan being considered by the court, each Denver voter was required to vote for 18

senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies within the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them. Rather, each legislator elected from a multi-member county represented the county as a whole.

The foregoing statements have been referred to in various opinions as "the objections" to multi-member districts.

Appellants under their third proposition, after calling attention to the fact that the metropolitan Des Moines area extends across the Polk County line into Warren County, pose the following questions: Is it equality that one person who works in the city of Des Moines can vote for 11 representatives and his neighbor because of the location of the house in which he lives can vote for only one? Is it equality that the person in Polk County can vote for five senators every four years and his neighbor in Jasper County can vote for only one? Is it equality to the citizens in Polk County that none of them has any single representative to whom he can look to represent his views in contrast to the neighbor in Warren County? On the other hand, is it equality that the neighbor in Warren County can only directly influence the vote of one representative or one senator whereas the Polk County citizen can directly influence the vote of 11 representatives and five senators?

The same contention was presented to the three-judge federal court in Davis v. Cameron, supra, 238 F. Supp., at 466, except Ringgold County was substituted for Warren County.

"Defendant Drake raises the additional issue that Senate File 1 is invalid because it creates two classes of representative and senatorial districts, that is, a single-member and multi-member districts. He contends 'that under said plan, although the voters of a majority of the counties are permitted to vote for but one representative and to elect only one representative, a voter residing in Polk County is permitted to vote for and elect 11 representatives. Thus the vote for representation in the House of Representatives of a voter residing in Polk County is thus given 11 times the weight of a voter in Ringgold County. That a voter in Polk County is a constituent of and is represented by 11 representatives in the Iowa General Assembly, whereas a voter in Ringgold County is a constituent of and is represented by only one representative in the House of Representatives.' He makes similar claims with respect to variances between the single and multi-member senatorial districts. In a recent decision the Supreme Court held that the creation of multi-member districts is not in itself a violation of the equal protection clause. Fortson v. Dorsey, (1965) 85 S. Ct. 498. The Court recognized in a proper case discrimination might be claimed and in this respect stated as follows:

"'* * * It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.'"

We fail to see the difference between the argument advanced by appellants in support of this contention and that advanced by Drake which we have quoted. The court in Cameron, supra, said: "Defendant Drake makes no

such claim herein. We therefore hold the creation of multi-member districts is not in itself invalid."

In written argument appellants quote extensively from Drew v. Scranton, 229 F. Supp. 310 (N.D. Penn. 1964), to support their contention. The court was considering Pennsylvania's representative reapportionment act which had set up a curious pattern of representative districts in the larger counties. In all counties entitled to two representatives, except Lebanon, single-member districts were created. Likewise, in cases of Lackawanna and York, entitled to four representatives, Berks, entitled to five, and Luzerne and Westmoreland, entitled to six, single-member districts were uniformly provided. But in the larger counties no such pattern was followed. Fourteen of the larger counties were entirely divided into single-member districts, while at the same time 15 other larger counties, many of them adjoining the single-member district counties, were divided into a crazy quilt of one, two, three and four-member districts. In the absence of any legislative history or other explanation justifying it, the court concluded "this districting is either the result of gerrymandering for partisan advantage, as was suggested at the hearing, or it was wholly arbitrary and capricious."

The 1965 temporary plan is not a legislative scheme creating single-member districts and multi-member districts in an arbitrary manner or the result of gerrymandering for partisan advantage, nor is it arbitrary and capricious. It creates no such situation as was before the court in Drew v. Scranton, supra. Certainly the provision for multi-member districts contained in the temporary plan has a legislative history justifying it.

The Iowa legislators, or at least a significant number of them, apparently took the position section 37 of the Iowa

constitution, which has remained in its present form since the Constitution of 1846, forbid subdistricting in Iowa. As pointed out in appellees' brief, the first apportionment in this state provided for multi-member districts (Lee County had five representatives and two senators, Van Buren and Des Moines counties each had four representatives and two senators). Section 37 was in force at the time as section 32. The legislature did not indulge in subdistricting then or at any subsequent time. Yet from 1846 to date some Iowa counties were entitled to multiple representatives. At no time has there been subdistricting. Historically, and on the basis of legal opinion available to them, the legislators who believed they were precluded from subdistricting were correct. It was their sworn duty to follow the constitution as written and as it remained after the federal court's condemnation of sections 34, 35 and 36.

Prior to this opinion the only authoritative legal interpretation of section 37 came from the three-judge federal court in Davis v. Synhorst, 217 F. Supp. 492; and 225 F.Supp. 689 (1964). Both cases clearly recognized that under the present Iowa constitution subdistricting would be prohibited; neither opinion indicated in any way such prohibition was or is repugnant to the United States Constitution. Today we have held section 37 does not prohibit subdistricting under the conditions set forth in Division VIII, supra.

This history dispels the reasons given by the three-judge federal court in Drew, supra, for its conclusions.

The 1965 temporary plan not only lacks the objections to which attention is called in Lucas and Fortson, both supra, as creating a proper case for claiming discrimination, but was an "honest and good faith effort to construct

districts in both houses of the legislature as nearly of equal population as practicable." Reynolds v. Sims, supra.

While Drew v. Scranton, supra, was pending on appeal, the Pennsylvania supreme court decided Butcher v. Bloom, 203 A. 2d 556. The judgment in Drew v. Scranton was then vacated by the United States Supreme Court.

Appellants further contend a system of at-large election of senators and representatives results in block voting and discrimination against persons within Polk County who might have a senator or representative elected to represent their views.

They assert subdistricting in Polk County would have guaranteed representation of the minority party in that county. As a basis for such claim they show 23 contiguous west side precincts, which include every precinct in Des Moines which has any portion thereof lying west of 30th Street to the west limits and from the north city limits to the south city limits, had 28 percent of the Polk County vote cast in the 1964 election (registered Republicans in this area outnumber registered Democrats by a margin of nearly two-to-one). In 1964 two Republican candidates for state representative received more votes in these 23 contiguous west side precincts than any Democratic candidates, but no Republicans were elected in Polk. Said differently, if there had been subdistricting in Polk County, it is possible two Republicans would have been elected as state representatives.

This same argument was urged in Stout v. Bottorff, 246 F. Supp. 825 (S.D. Ind. 1965). The court, reaching a conclusion contrary to appellants' contention, said:

"We also see no merit in plaintiff Grills' attack on the 1965 Act for failure of the legislature to divide Marion

County into districts rather than making it a single, multi-member district electing members of the general assembly at large. In support of this claim that the Act thus deprives certain voters in Marion County of equal representation Grills has submitted voting records showing that in some past elections certain townships or other areas of the county would have elected a candidate of the minority party in that particular election if the county had been subdistricted. We have been shown no evidence in these records of any discrimination, purposeful or otherwise, against any group of voters in the at-large election system in Marion County, and in the absence of such a showing, Grills is not entitled to any relief on the basis of this claim." Citing cases.

No citizen of Iowa as a result of the legislative scheme provided by the 1965 temporary plan has been deprived of his right to vote for the duly nominated candidate of the party of his choice and in the area in which he resides.

The burden of proving a legislative enactment to be violative of the constitution rests upon those so asserting to the degree of negativing every reasonable basis of support therefor. Faber v. Loveless, 249 Iowa 593, 597, 88 N.W. 2d 112, 114, and citations; Davis v. Synhorst, 217 F. Supp., at 497.

Appellants' contentions considered in combination in this division cannot be sustained.

X. Under the second proposition relied on for reversal appellants contend there is a valid constitutional requirement today that the Iowa Senate be composed of 50 members. In support they urge section 34, Amendment of 1904, provided for a Senate of 50 members apportioned among the several counties or districts according to population, and it was the limitation that no county shall be en-

titled to more than one (1) senator, placed on this section by the Amendment of 1928, that led the three-judge federal court in Davis v. Synhorst, 217 F. Supp. 402, to declare this section unconstitutional as being invidiously discriminatory.

In the alternative, they urge sections 34, 35, 36 and 37 of Article III of the state constitution be declared inseparable and where portions of three of the provisions have been held federally unconstitutional, the remaining portion of these three provisions plus the fourth provision must also fall as an inseparable part of the apportionment scheme.

We do not agree with appellants' first contention under this proposition, nor can we accept their argument in the alternative. In Davis v. Synhorst, 225 F. Supp. 689, the federal court was correct when it said at page 692:

"* * * It is the view of the court that Article III, sections 34, 35, and 36 of the Iowa Constitution which have as their object and purpose the establishment of a complete apportionment plan for the selection of members of both houses of the General Assembly are inseparable. Under the circumstances of this case it is our opinion that said sections in combination are inseparable." Citing cases. We believe the statement is sound and adopt it here.

The Constitution of 1846 contained Article III, section 37, as it now exists as Article III, section 32. Article XII, section 7, designated the number of representatives for each county. Article III, section 31, set out the number of senators and representatives, how apportioned among the county and how often apportioned.

The 1857 Constitution retained section 37 as unchanged, whereas, sections 34, 35 and 36 embodied a new plan of apportionment. Section 34 referred to senators and

how they were to be apportioned and how often. Section 35 set out the number of senators and representatives; it set out a restriction on the number of counties in a representative district; it set out circumstances where a county or district would be entitled to one representative and when any county or district would be entitled to an extra representative; and it provided there would be no floating districts. Section 36 provided that in every legislative session a ratio would be fixed and legislative districts would be formed.

In 1904 a new reapportionment plan became law. The Amendments of 1904 repealed prior sections 34, 35 and 36 and adopted sections 34, 35 and 36 as set out in Division II, supra. Sections 34, 35 and 36 are a scheme of legislative reapportionment which is inseparable for, if section 35 is stricken, that which remains is incomplete and does not accomplish an effective scheme for the constituting of the Iowa legislature.

In 1904 the legislature and the people had before them a complete reapportionment plan with sections 34, 35 and 36 thereof interrelated and so connected with the whole act that when section 35, which has been declared unconstitutional by the federal court, is stricken from such scheme, it is impossible to give full effect to what appears to have been the intent of the legislature.

Sections 34, 35 and 36 being inseparable, it follows there is no valid constitutional requirement today that the Iowa Senate be composed of 50 members.

Where the act is single as to its objective, or seeks to obtain a single object or purpose, then if part of the act is unconstitutional, such part cannot be separated from the constitutional part if they are connected and dependent upon each other so that if you reject the unconstitutional

part you destroy the legislative intent, then the whole act must fall. Smith v. Thompson, 219 Iowa 888, 898, 258 N.W. 190, 196.

Where part of an amendment to a state constitution is invalid because it violates the Federal Constitution, if the several parts of the amendment are separable, the valid portions may be saved, unless it is obvious that the intent of the adopters of the amendment was to accept one general scheme in an entirety, in which event, if part of the amendment falls, the whole must fall with it. 16 Am. Jur. 2d, Constitutional Law, section 42.

We agree with the view of the federal court as expressed in Davis v. Synhorst, 225 F. Supp. 689, 692, that section 37 is not an inseparable feature of the constitutional apportionment provisions. It does not conflict with the requirements of equal protection of the laws required by the state and federal constitutions under the interpretation we have given to such section in Division VIII, supra, and thus remains a part of our constitution.

XI. The trial court, as a matter of declaratory judgment requested in defendants' counterclaim, approved the 1965 temporary apportionment plan as a constitutional interim plan of apportionment. While Senate File 568, chapter 88, Laws Sixty-first General Assembly of Iowa (1965 temporary apportionment plan) contains objections to both state and federal standards required for equal protection as disclosed by the record in Polk County, the only multi-member district before us in this case, it is sufficient to serve as an interim plan of apportionment. Reference will be made to these objections later in this opinion. We now hold that members of the Sixty-second General Assembly of Iowa be elected at the 1966 election in accordance with its terms and provisions.

XII. We do not believe the creation of multi-member districts, of itself, would violate either the state or federal constitutions simply because the voters in a particular district (where justified by population) would vote for two or more representatives while those in another district would vote for a lesser number. However, we do believe where the objections to multi-member districts as set out in Lucas, Fortson and Drew, supra, are found to exist to the point where there is invidious discrimination leading to the conclusion that equal protection rights are violated, a plan of apportionment able to withstand constitutional attack would be more readily accomplished by subdistricting in those instances.

XIII. The record indicates many of the same objections contained in Lucas, Fortson and Drew, supra, existed in the 1964 Polk County election and will probably continue to exist there unless we direct subdistricting in that county.

In the 1964 primary election the voter wishing to vote the Democratic ticket was confronted with a ballot containing the names of 33 candidates seeking the 11 nominations for state representative from that county; for state senator, there were two candidates for the four-year term and two for the one-year term. The voter desiring to vote in the Republican primary was confronted with a ballot containing the names of 14 candidates seeking the 11 nominations of that party.

At the 1964 general elections a voter was confronted with a ballot containing the names of 22 candidates seeking the 11 vacancies for state representative; one candidate on each ticket for state senator for the two-year term and one on each ticket for the four-year term; in addition there were the Conservative party's candidates.

The ballots were long and cumbersome and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies within the county resulted and the residents of the various areas had no single member of the House or Senate elected specifically to represent them. Rather, each legislator elected from Polk County represented the county as a whole. When a citizen is faced with the task of selecting 11 representatives, as he was in Polk County, there is a serious question as to whether he discriminates among the various candidates in order to make a judgment of the candidate's qualifications. It places a severe strain on the voter's capacity.

While we hold the 1965 temporary reapportionment plan is sufficient for the 1966 elections, this record leads us to the conclusion that in order to provide equal protection of the laws, subdistricting is necessary in Polk County thereafter. The constitutional provisions determined in Division IX, supra, apply to all multi-member districts where invidious discrimination exists leading to the conclusion that equal protection rights are violated, and are not limited to Polk County.

It is our opinion that a special session of the legislature is not necessary to accomplish this objective. The Sixty-second General Assembly of Iowa will have the power to and is the appropriate body to provide such subdistricting.

Reapportionment is primarily a matter for legislative consideration and determination, and judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Reynolds v. Sims, supra, 377 U.S., at 586, 84 S. Ct., at 1394.

The decided cases, almost without exception, recognize that state instrumentalities should be afforded a reason-

able opportunity to reapportion themselves along constitutional lines. Davis v. Synhorst, supra, 217 F. Supp., at 505.

Progress has been made by the legislature since the decision in the first of the four federal cases involving reapportionment in Iowa, and we have every reason to believe the next session of the General Assembly of Iowa will promptly enact such legislation.

The Iowa legislature must approach their assignment with the understanding they are to create districts for each legislative branch which are as nearly equal in population as is practicable. This is the basic concept. We repeat, mathematical exactness or precision is hardly a workable constitutional requirement. Reynolds v. Sims, supra, 377 U.S., at 577, 84 S. Ct., at 1390. We do not attempt to state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population. It is neither practicable nor desirable to establish rigid mathematical standards. Rather, the proper judicial approach, is to ascertain whether there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination. Roman v. Sincock, supra, 377 U.S., at 710, 84 S. Ct., at 1470.

For a discussion as to the population variances considered in Reynolds v. Sims, supra, and other companion cases of the same day, we refer to Davis v. Cameron, supra, 238 F. Supp., at 464.

We also refer to the four federal cases from the southern district of Iowa as well as Honsey v. Donovan, 236 F. Supp. 8 (D.C.D. Minn. 4th Div., December 4, 1964), for some additional legislative guidelines.

We retain jurisdiction to consider prescribing an interim plan of reapportionment providing for subdistricting in Polk County in the event it becomes apparent that no substantial progress is being made by the Sixty-second General Assembly to provide such subdistricting.

To summarize the foregoing opinion:

1. The equal protection clause of the state and federal constitutions requires substantially equal legislative representation for all citizens of a state. This is the basic concept.

2. The 1965 temporary apportionment plan contains objections to both state and federal standards required for equal protection as disclosed by the record in Polk County, the only multi-member district before us in this case.

3. Subdistricting is required in Polk County after the 1966 elections.

4. A special session of the Sixty-first General Assembly is not required to accomplish this objective.

5. The 1965 temporary reapportionment plan is sufficient to serve as an interim plan of apportionment.

6. Members of the Sixty-second General Assembly are to be elected in accordance with the terms and provisions of Senate File 568, chapter 88, Laws Sixty-first General Assembly of Iowa (1965 temporary apportionment plan).

7. The Sixty-second General Assembly of Iowa will have the power to and is the appropriate body to provide such subdistricting.

8. The equal protection clause requires that a state make an honest and good faith effort to construct districts, in both houses of the legislature, as nearly of equal population as is practicable.

9. But mathematical exactness or precision is hardly a workable constitutional requirement. And it is neither practicable nor desirable to establish rigid mathematical standards. Rather, the proper judicial approach, is to ascertain whether there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

10. So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible.

11. Universal equality is not the test; there is room for other considerations.

12. The burden of proving a legislative enactment to be violative of the constitution rests upon those so asserting to the degree of negativing every reasonable basis of support therefor.

13. Jurisdiction of the court in this case is retained.

XIV. Defendants' motion to strike matters from appellants' brief ordered submitted with this appeal is overruled.

Costs are taxed one-third to plaintiffs and two-thirds to defendants.

Affirmed in part and reversed in part.

STUART, J.—We cannot agree with Divisions IX and XII of the principal opinion by Justice Mason. It follows that we must also take exception to certain statements contained in Division XIII related thereto. As a majority

of the court favors the view expressed herein, Divisions IXA and IXB, which follow, replace Division IX in the principal opinion as the opinion of the court on the issues therein discussed.

IXA. Appellants contend the 1965 temporary reapportionment plan which includes both multi-member and single-member districts in each house of the legislature violates Article I, section 6 of the Bill of Rights of the Constitution of the State of Iowa, which provides:

"All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

The citizens whose rights are at issue here are divided into two classes. (1) Those who reside in single-member districts and (2) those who reside in multi-member districts. We must examine the temporary plan to determine if it has equal operation between these two classes and whether one class has privileges and immunities not available to the other.

The problem facing us here is well illustrated by the situation which exists in metropolitan Des Moines. Residential areas to the south of Des Moines extend into Warren County. A person on the south side of the road, living in Warren County can vote for only one senator and one representative. His neighbor across the road to the north, living in Polk County can vote for five senators and eleven representatives. The resident of Warren County can vote for 1/61st of the senate and 1/124th of the house. The resident of Polk County can vote for 1/12th of the senate and 1/11th of the house.

There mere statement of this example discloses the basic unfairness, inequality and lack of uniformity inherent in such a scheme of legislative apportionment. The inequalities are not just theoretical. Equal voting power for all citizens is the goal. Proposed legislation requires a majority vote of the members of each house to become a law. It is a political reality that legislators are much more inclined to listen to and support a constitutent than an outsider with the same problem. It is equally basic that much legislative work is done by committees and there is a distinct advantage in having one's own representative sitting as a member of a committee considering legislation in which one has an interest. A resident of Polk County has 1/12th of the senate and 1/11th of the house which will listen to his problems with a sympathetic ear. A resident of Warren County can expect the same attention from only 1/61st of the senate and 1/124th of the house. Particularly in personal interest legislation, the resident of Polk County has an unfair and unequal advantage over the resident of Warren County or of any other single-member district. He has a much greater opportunity to find legislators to espouse his cause and a much greater chance that one or more of his representatives will be on the committee to which his legislation is assigned. His voting power is much greater.

Any scheme of legislative apportionment in which there are multi-member districts and single-member districts in the same house impairs the right of a resident of a single-member district to have the laws operate uniformly as guaranteed by section 6, Article I of the Constitution of Iowa. Such impairment violates his constitutional rights unless it can be shown such peculiar circumstances exist that a rational plant of apportionment cannot be achieved by using all single-member districts. We

do not foreclose the possibility that in some instances there may be legitimate considerations which would make some multi-member districts constitutionally permissible.

IXB. Appellants also argue this temporary plan violates the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

The Supreme Court has clearly indicated that perfect equality among voters would require that each citizen's vote be of the same weight and effect as the vote of every other citizen. Any plan of representation which deviates sufficiently from that goal is said to be "invidiously discriminatory" and to violate the Equal Protection Clause of the 14th Amendment to the United States Constitution. In Gray v. Sanders (March 1963), 372 U.S. 368, 379-381, 9 L.Ed. 2d 281, 83 S. Ct. 801, Mr. Justice Douglas, speaking for the majority of the court, said: "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his state, when he casts his ballot in favor of one of several competing candidates underlies many of our decisions. * * * The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote."

In Reynolds v. Sims (June 15, 1964), 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 506, and five other cases handed down the same date, the Supreme Court applied the principles set forth in Gray v. Sanders to the apportionment of state legislatures and concluded "that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis". 576, L.Ed. 535. The court recognized the impossibility of "mathematical exact-

ness and precision" and stated: "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature" (p. 579, L.Ed. 537).

However, as pointed out in the dissent of Justice Harlan, in Reynolds v. Sims, p. 622, L.Ed. 562, the six cases filed June 15, 1964, ruled out as legitimate considerations "(1) history; (2) 'economic or other sorts of group interests'; (3) 'area'; (4) geographical considerations; (5) a desire 'to insure effective representation for sparsely settled areas'; (6) 'availability of access of citizens to their representatives'; (7) theories of bicameralism (except those approved by the court); (8) occupation; (9) 'an attempt to balance urban and rural power'; (10) the preference of a majority of voters in the state."

The only two "legitimate considerations" suggested are a "legislative desire to maintain the integrity of various political sub-divisions, insofar as posible", Reynolds v. Sims, p. 578, L.Ed. 537 and a "reasonable plan for periodic revision of their apportionment schemes". Supra, p. 583, L.Ed. 539.

We must apply these principles to the factual situation set out in IXA relating to Article I, section 6 of the Constitution of Iowa. Is Equal Protection afforded when one citizen votes for 1/61st of the senate and 1/124th of the house and another citizen votes for 1/12th of the senate and 1/11th of the house? We don't believe it is.

The appellees rely on Davis v. Cameron, 238 F. Supp. 462, 466; Reynolds v. Sims, 377 U.S. 533, 86 S.Ct. 1362, 12 L.Ed.2d 506; Lucas v. Colorado General Assembly, 377 U.S.

713, 84 S.Ct. 1459, 12 L.Ed.2d 632; and Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, L.Ed.2d .

In Davis v. Cameron, supra, appellant's argument here was presented to the three judge federal court in Iowa. It was rejected without analysis, discussion or explanation on the authority of Fortson v. Dorsey, Supra.

In Fortson v. Dorsey, supra, the legislative scheme in question divided some counties into districts and provided: "Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own district, except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located."

The case considered only whether the rights of the residents of the multi-district counties were protected. It was claimed the scheme was defective because county-wide voting in multi-district counties could thrust upon the voters of a district a senator for whom no one in the district had voted. This argument was rejected although the court recognized a multi-member district might in a particular instance violate the Equal Protection Clause. As all voters within the district had equal voting rights, any denial of equal protection must necessarily have depended on the facts. The argument before us here was not considered.

In Fortson v. Dorsey, the court cited as authority the dictum from Reynolds v. Sims set forth in the majority opinion. These statements have been classified as "rather casual dictum" (63 Mich. L.R. 219. Dec. 1964). The problem confronting us here was not before the court at that time. Arguments advanced here were not considered.

In Lucas v. Colorado General Assembly, supra, the Supreme Court pointed out the undesirable features of a multi-member district as it affected the residents of the district. There was no argument made as to the effect on citizens of single-member districts.

Although these cases intimate that the combination of multi-member and single-member districts does not violate the Equal Protection Clause, they have not considered the problem from the standpoint of the resident of a single-member district. The court has never viewed the problem in the light of the one man-one vote concept. No one has ever explained why a scheme which seems to be a patent violation of the one man-one vote concept does not offend the Equal Protection Clause. In view of the deep concern the Supreme Court has repeatedly shown for the rights of the individual and for ultimate fairness, we believe it will hold such scheme violates the Equal Protection Clause when the argument here advanced is presented. Consistent application of the principles announced in Reynolds v. Sims seems to compel that result.

The Supreme Court said in Gray v. Sanders, 372 U.S. 368, 379, 9 L.Ed.2d 821, 829, 83 S. Ct. 801: "How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." It is just as unconstitutional for a person residing in an urban area to have 11 times the voting power of a person residing in a rural area as it is to have the voting power reversed.

The one man-one vote principle, as it applies to legislatures, is thoroughly explored by Mr. Chief Justice Warren in Reynolds v. Sims. Many of his statements contained therein are particularly applicable to this situation. The page references are to the L.Ed.

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" (p. 523, 524).

"A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature" (p. 527).

"And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. *It would appear extraordinary to suggest that a state could be constitutionally permitted to enact a law providing that certain of the state's voters could vote, two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once.* And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five or 10, while the votes of

persons in another area would be counted only at face value, could be constitutionally sustainable" (p. 527-528). (Emphasis added)

"Weighting the votes of citizens differently, by any method of means, merely because of where they happen to reside, hardly seems justifiable" (p. 528).

"And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. * * * Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, * * *" (p. 229, 230).

"However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of the weight of the votes of certain of the state's citizens merely because of where they happen to reside." W.M.C.A. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1362, 12 L.Ed. 2d 568.

Attention could be called to many other similar statements but those set out indicate the thinking of the Supreme Court and the application here is obvious.

Argument has been made that the voter in a single-member district has a greater influence with his one leg-

islator who may only have 30,000 constituents than a voter with eleven legislators who have 300,000 constituents. Assuming this is true for the purpose of argument, it only offers evidence of a factor to consider in determining whether residents within the multi-member district are also denied equal protection of the laws. We know of no rule whereby the denial of equal protection to one class for one reason can be set off against the denial of equal protection to another class for a different reason in such a manner as to make an apportionment plan constitutional.

Argument is also advanced that equal protection is accomplished because in Polk County approximately 1/12th of the population votes for 1/12th of the legislature and in Warren County approximately 1/120th of the population votes for 1/120th of the house and in Warren and Marion Counties 1/60th of the population votes for 1/60th of the senate. Such an arrangement may meet the population limitations of equal protection but it certainly does not protect the rights of the individual who is the primary beneficiary of the Equal Protection Clause. One twelfth or 1/120th of the population has no definable or recognizable rights, privileges, opinions or positions as such. It is the individual within the fraction of the population who is entitled to protection. This is not achieved by lumping him in with 299,999 other people. This is not one man-one vote. "A citizen's constitutional rights can hardly be infringed simply because a majority (or 1/12th) of the people choose to do so." Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S. Ct. 1459, 12 L.Ed.2d 632.

A point is made of the fact that historically the Iowa legislature has had multi-member districts. This is true. We have not, heretofore, been called upon to pass on their

constitutionality. As long as Iowa was basically an agricultural state, there was no problem. The need to reapportion our legislature developed out of the industrialization and farm mechanization which have occurred in the last 30 years. During that period the constitution has not permitted more than two-member districts. No county has been allowed more than one senator.

Attention has been concentrated on multi-member districts and districts of unequal population since the United States Supreme Court's one man-one vote decisions. Prior to those decisions, it was thought the states had a right to consider factors other than population in apportioning their legislatures. Now the "legitimate considerations" are quite restricted. Equal application of the one man-one vote concept limits the legislature's right to establish multi-member districts to the same extent it is prohibited from departing from the equal population requirement by the Supreme Court decisions.

Only in Pennsylvania has the one man-one vote argument been considered by the courts. In Drew v. Scranton, 229 F. Supp. 310, a special three judge court considering the apportionment plan for Pennsylvania was confronted with a "haphazard arrangement of two, three and four-member districts alongside of single-member districts". The court said: "we think that invidious discrimination in voting power results when, as in the case before us, some Pennsylvania voters may by reason of the arrangement of legislative districts vote for two, three or even four representatives, while others are restricted to voting for one only. Certainly a voter in a four-member district will not only have four votes for representative, but he will also have four members of the House who will be especially concerned with his views and interests and amenable to his persuasion, since they will want the benefit of his suffrage

for re-election. The voter in a single-member district, however, will have only one representative to look to express his views and espouse his interests. We are, of course, not dealing here with a case where all the representatives are elected at large, so that each voter has the same number of votes as every other voter, or with a situation where the districts all elect the same number of members, whether two or more. Those situations do not violate the principle of one man-one vote. But we think that this principle means what it says. It does not mean, for example, in Allegheny County one man-one vote in McKeesport, two votes in Clairton, three votes in Wilkinsburg and four votes in Sewickley, which the statute under consideration authorizes."

They held "that the provisions of the representative apportionment act for multi-member districts in certain parts of certain counties deny to the voters in single member districts of those and other counties the equal protection of the laws by depriving them of voting power equal to that of the voters of the multi-member districts" (p. 328). The Supreme Court vacated this judgment for other reasons.

In Butcher v. Bloom (Sept. 1964), 203 A.2d 556, 573, the Supreme Court of Pennsylvania in setting guidelines for the legislature considered "it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts" but did not believe multi-member districts and single-member districts combined violated the Federal Constitution. However, for the reasons set out above, we believe single-member districts are as essential to the protection of an individual's rights under the Equal Protection Clause as are equally populated districts.

If the Equal Protection Clause is violated when certain representatives are given an unequal number of constituents, the converse is also true. The Equal Protection Clause is violated if certain constituents are given an unequal number of representatives.

The Supreme Court recognized in Reynolds v. Sims, supra, that mathematical precision was not a workable constitutional requirement. "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible." The same legitimate considerations which would make multi-member districts constitutionally permissible under the Iowa Constitution apply here. We believe it difficult, if not impossible, however, to justify constitutionally, a multi-member district in which the ratio of members therein to a single-member district exceeds the variance in population between districts which has been approved by the United States Supreme Court.

We therefore hold that the 1965 temporary reapportionment plan violates section 6, Article I of the Constitution of Iowa and the 14th Amendment to the Constitution of the United States.

XII. We do not agree with Division XII of the principal opinion and would eliminate it.

XIII. We agree with that portion of Division XIII of the principal opinion which holds the 1965 temporary plan denies equal protection to the residents of Polk County. We also agree the legislature should be given further opportunity to work out a constitutional apportionment plan and jurisdiction should be retained in the event it is unable to do so.

Because the determination of constitutional principles in Division IX of Judge Mason's opinion differs from our determination in IXA and IXB, we believe it necessary to make it clear these Divisions also apply to all multi-member districts and are not limited to Polk County.

We also believe the reasons for deciding to permit an election under the 1965 temporary plan should be amplified. It would be most difficult for the 61st General Assembly to meet and formulate a plan in time for the primary elections to be held this year. Special elections would have to be called to fill vacancies. There is a possibility this decision will be appealed to the Supreme Court, which would require a stay. The 61st General Assembly has the same constitutional deficiencies determined by this decision to exist in the 1965 temporary plan. In addition to this fact, it does not conform as closely to the population requirement as the 1965 temporary plan.

The United States Supreme Court has recognized the difficulty presented in such situations. In Reynolds v. Sims, supra, the court said: "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely on general equitable principles." The lower courts were directed to determine the equities in each situation in W.M.C.A. v. Lomenzo, supra, Roman v. Sincock, supra, and Lucas v. Colorado General Assembly, supra. As a matter of equity and in light of all the circumstances set forth above, we conclude orderly reapportionment can best be accomplished by permitting the 62nd General Assembly to be elected under the 1965 temporary reapportionment plan set forth in chapter 88, Laws of 61st General Assembly.

We also disagree with statements in the summary contained in Division XIII which are in conflict with this opinion.

We reverse the trial court for the reasons expressed in Divisions IXA and IXB as well as for the reasons expressed in the principal opinion.

KRUIDENIER v. McCULLOCH, #57

LARSON, J.—concurring specially:

I am unable to agree with the majority conclusion in Division X that sections 34, 35 and 36, of Article III, of the State Constitution are inseparable, and that there is no valid constitutional requirement today that the Iowa Senate be composed of 50 members.

I agree that the rules of construction and interpretation applicable to statutes on separability also apply to constitutional questions. State v. Chicago, B. & Q. R. Co., 195 Mo. 228, 93 S. W. 784. But I do not agree that the federal court holding in Davis v. Synhorst, 217 F. Supp. 402, that these sections were inseparable was necessary or correct.

As I understand the generally-acknowledged rules applicable to separability, the courts are reluctant and slow to declare an entire act of the legislature unconstitutional if for some reason a part thereof is invalid and violence to the general intent will not be done by such a severance. In other words, the court must, if possible, save the good and only eliminate the bad, if the good can stand by itself. This rule the majority seems to recognize by the reference to 16 Am. Jur. 2d, Constitutional Law, section 42, but there again this authority clearly states, "unless it is obvious that the intent of the adopters of the amendment was to accept one general scheme in an entirety", the valid portions may

be saved. I would hold sections 34 and 35 of the 1904 amendment are separable, that on its face it is not obvious the adopters thereof intended all or none of the amendments be accepted, and that section 34 complied perfectly with the requirements of the Equal Protection Clause of the Federal Constitution, as well as Article I, section 6, of the State Constitution, for the upper house of a bicameral state legislature. It is obvious the adopters desired that each house thereafter be considered separately, not as it had been under the 1846 Constitution where a single section, 31, set out both the number of senators and representatives to be chosen and provided how they were to be apportioned in both houses.

I think it is significant here that the apportionment and number in each house were dealt with separately. There is not the slightest hint that the apportionment in one house is dependent upon or reflected in the other. Section 34 of the 1904 amendment provided: "The senate shall be composed of fifty members to be elected from the several senatorial districts, established by law and at the next session of the general assembly held following the taking of the state and national census, they shall be apportioned among the several counties or districts of the state, according to population as shown by the last preceding census." Proponents of change would be hard-pressed to draw, even today, a provision for the senate that would better conform to the requirements of the Federal Constitution as construed by the federal courts.

Admittedly, section 35 of the 1904 amendment was bad and, as section 36 is inseparable with it, both must fall. Section 35 dealt with the apportionment of the house alone and thus can be stricken without doing violence to the adopters' intent as to the senate. As bearing on this question, see comments in Lucas v. Colorado General Assembly,

377 U. S. 713, 12 L. ed. 2d 632, 646, 84 S. Ct. 1472, where the question of severability was considered and the court's position was announced in Maryland Committee v. Tawes, 377 U. S. 673, 12 L. ed. 2d 606. The court said it would have to consider the constitutionality of the apportionment plan as a whole where deviations from a strict population basis existed. If the scheme allowed a slight deviation in both houses so that they might be accumulative to the disadvantage of certain areas, then the *whole* plan might fail. Obviously such a situation would not result from the 1904 amendment adopted in Iowa, since section 34 is based solely on population. I, therefore, would hold the provisions of section 34 must be allowed to stand.

Such a decision would, of course, produce a conflict with the temporary plan used in the previous election and contemplated for 1966, where 57 senate seats are involved. This might be a logical basis to require a special session of the legislature before the 1966 election. However, due to the shortness of time and the history of this litigation, I am satisfied the temporary plan should be followed for the 1966 election but no further, and that the provision of section 34 fixing the number of senators at 50, and providing for their method of election, should be followed thereafter until altered by a proper constitutional amendment.

I have said nothing about the 1928 amendment which obviously made section 34 bad. As the three sections then stood, they were all invidiously discriminatory and the federal court should have so determined the issue on that basis. However, we can and should strike the 1928 amendment to section 34 which provided, "but no county shall be entitled to more than one (1) senator", as in conflict with Article I, Section 6, and with the Federal Equal Protection Clause. This would permit section 34, Article III, of the

State Constitution, as adopted in 1904, to stand, and require only a new plan of apportionment for the house in this state. I would so hold.

APPENDIX C

SENATE FILE 568

AN ACT

TO PROVIDE FOR REPRESENTATION IN THE SENATE AND HOUSE OF REPRESENTATIVES IN THE SIXTY-SECOND GENERAL ASSEMBLY AND THEREAFTER.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Chapter one (1), Acts of the Sixtieth General Assembly in Extraordinary Session, is hereby repealed.

Sec. 2. The general assembly hereby determines that in order to provide fair representation for all citizens of Iowa in the interim period before a constitutional amendment becomes effective, the apportionment of the general assembly shall be based upon the following principles:

1. The house of representatives shall be apportioned on a population basis.

2. The senate shall be apportioned on a fair and reasonable basis, taking into account population to guarantee citizens of the state fair and equal representation. In order to give proper recognition to such principals, the following shall apply:

a. Any county having more than thirty-five thousand (35,000) population shall be a senatorial district and shall be entitled to one (1) senator. In addition, each county having a population of seventy thousand (70,000) or more shall be entitled to such additional senators as shall guarantee fair and equal representation to the citizens of such counties.

b. No county having less than thirty-five thousand (35,000) population shall be joined in a senatorial district with any county having more than thirty-five thousand (35,000) population.

c. No senatorial district shall contain more than four (4) counties.

d. The counties having less than thirty-five thousand (35,000) population shall be joined in senatorial districts of two (2) counties, three (3) counties, or four (4) counties. In forming such districts, counties whose people have a high degree of common interests shall be joined together when practicable.

The general assembly hereby declares that the foregoing principles have been followed in this Act and that the provisions of this Act are necessary and reasonable in order to provide fair representation in the general assembly for all citizens of Iowa.

Sec. 3. The number of senators in the general assembly is hereby fixed at sixty-one (61) and they are hereby apportioned among the several counties as follows:

1. Lee county shall constitute the first district with one (1) senator.

2. Davis county, Jefferson county, and Van Buren county shall constitute the second district with one (1) senator.

3. Appanoose county, Lucas county, and Monroe county shall constitute the third district with one (1) senator.

4. Clarke county, Decatur county, Ringgold county, and Wayne county shall constitute the fourth district with one (1) senator.

5. Adams county, Montgomery county, Taylor county, and Union county shall constitute the fifth district with one (1) senator.

6. Fremont county, Mills county, and Page county shall constitute the sixth district with one (1) senator.

7. Des Moines county shall constitute the seventh district with one (1) senator.

8. Henry county, Louisa county, and Washington county shall constitute the eighth district with one (1) senator.

9. Wapello county shall constitute the ninth district with one (1) senator.

10. Keokuk county and Mahaska county shall constitute the tenth district with one (1) senator.

11. Marion county and Warren county shall constitute the eleventh district with one (1) senator.

12. Adair county, Cass county, and Madison county shall constitute the twelfth district with one (1) senator.

13. Pottawattamie county shall constitute the thirteenth district with two (2) senators.

14. Cedar county and Muscatine county shall constitute the fourteenth district with one (1) senator.

15. Scott county shall constitute the fifteenth district with two (2) senators.

16. Clinton county shall constitute the sixteenth district with one (1) senator.

17. Johnson county shall constitute the seventeenth district with one (1) senator.

18. Iowa county and Poweshiek county shall constitute the eighteenth district with one (1) senator.

19. Jasper county shall constitute the nineteenth district with one (1) senator.

20. Polk county shall constitute the twentieth district with five (5) senators.

21. Audubon county, Dallas county, and Guthrie county shall constitute the twenty-first district with one (1) senator.

22. Harrison county, Monona county, and Shelby county shall constitute the twenty-second district with one (1) senator.

23. Jackson county and Jones county shall constitute the twenty-third district with one (1) senator.

24. Linn county shall constitute the twenty-fourth district with three (3) senators.

25. Benton county and Tama county shall constitute the twenty-fifth district with one (1) senator.

26. Marshall county shall constitute the twenty-sixth district with one (1) senator.

27. Story county shall constitute the twenty-seventh district with one (1) senator.

28. Boone county and Greene county shall constitute the twenty-eighth district with one (1) senator.

29. Carroll county and Crawford county shall constitute the twenty-ninth district with one (1) senator.

30. Dubuque county shall constitute the thirtieth district with two (2) senators.

31. Buchanan county and Delaware county shall constitute the thirty-first district with one (1) senator.

32. Black Hawk county shall constitute the thirty-second district with three (3) senators.

33. Franklin county, Grundy county, and Hardin county shall constitute the thirty-third district with one (1) senator.

34. Hamilton county and Wright county shall constitute the thirty-fourth district with one (1) senator.

35. Webster county shall constitute the thirty-fifth district with one (1) senator.

36. Calhoun county, Ida county, and Sac county shall constitute the thirty-sixth district with one (1) senator.

37. Woodbury county shall constitute the thirty-seventh district with two (2) senators.

38. Allamakee county and Clayton county shall constitute the thirty-eighth district with one (1) senator.

39. Fayette county and Winneshiek county shall constitute the thirty-ninth district with one (1) senator.

40. Bremer county, Chickasaw county, and Howard county shall constitute the fortieth district with one (1) senator.

41. Butler county, Floyd county, and Mitchell county shall constitute the forty-first district with one (1) senator.

42. Cerro Gordo county shall constitute the forty-second district with one (1) senator.

43. Hancock county, Winnebago county, and Worth county shall constitute the forty-third district with one (1) senator.

44. Humboldt county and Kossuth county shall constitute the forty-fourth district with one (1) senator.

45. Emmet county, Palo Alto county, and Pocahontas county shall constitute the forty-fifth district with one (1) senator.

46. Buena Vista county and Clay county shall constitute the forty-sixth district with one (1) senator.

47. Cherokee county and Plymouth county shall constitute the forty-seventh district with one (1) senator.

48. Dickinson county, O'Brien county, and Osceola county shall constitute the forty-eighth district with one (1) senator.

49. Lyon county and Sioux county shall constitute the forty-ninth district with one (1) senator.

This Act shall be effective as to the nomination and election of one (1) senator, except as otherwise indicated, from each of the following districts in the year 1966 and thereafter for four-year terms each:

First (1st)
Sixth (6th)
Seventh (7th)
Eighth (8th)
Ninth (9th)
Thirteenth (13th)
Fourteenth (14th)
Fifteenth (15th)
Sixteenth (16th)
Eighteenth (18th)
Nineteenth (19th)
Twentieth (20th) (three to be elected)
Twenty-second (22nd)
Twenty-third (23rd)
Twenty-fourth (24th) (two to be elected)

Twenty-fifth (25th)
Twenty-seventh (27th)
Twenty-ninth (29th)
Thirtieth (30th) (two to be elected)
Thirty-second (32nd) (two to be elected)
Thirty-third (33rd)
Thirty-fourth (34th)
Thirty-sixth (36th)
Thirty-seventh (37th)
Fortieth (40th)

This Act shall be effective as to the nomination and election of one (1) senator from the following district in the year 1966 for a two-year term:

Twentieth (20th)

The terms of senators elected in 1964 for terms of four (4) years or elected subsequently to fill a vacancy in any such term shall continue until December 31, 1968. In the year 1968 and thereafter one (1) senator, except as otherwise indicated, shall be nominated and elected from each of the following districts for four-year terms each:

Second (2nd)
Third (3rd)
Fourth (4th)
Fifth (5th)
Tenth (10th)
Eleventh (11th)
Twelfth (12th)
Thirteenth (13th)
Fifteenth (15th)
Seventeenth (17th)

Twentieth (20th) (two to be elected)
Twenty-first (21st)
Twenty-fourth (24th)
Twenty-sixth (26th)
Twenty-eighth (28th)
Thirty-first (31st)
Thirty-second (32nd)
Thirty-fifth (35th)
Thirty-seventh (37th)
Thirty-eighth (38th)
Thirty-ninth (39th)
Forty-first (41st)
Forty-second (42nd)
Forty-third (43rd)
Forty-fourth (44th)
Forty-fifth (45th)
Forty-sixth (46th)
Forty-seventh (47th)
Forty-eighth (48th)
Forty-ninth (49th)

For the legislative session in 1967 and at any special session thereafter prior to 1969 the following counties are hereby attached for the purpose of representation in the senate to the present districts designated opposite the name of the county:

Jefferson to the second (2nd)
Appanoose to the third (3rd)
Clarke and Wayne to the fourth (4th)
Union to the fifth (5th)
Cass to the thirteenth (13th)

Audubon to the twenty-ninth (29th)
Mitchell and Floyd to the forty-second (42nd)
Worth to the forty-seventh (47th)
Pocahontas to the forty-eighth (48th)
Dickinson to the forty-ninth (49th)
Buena Vista to the fifty-first (51st).

Sec. 4. The house of representatives shall be apportioned on a population basis as follows and representatives shall be elected in 1966 and each two (2) years thereafter:

The counties of Lyon and Osceola shall comprise one (1) district and elect one (1) representative.

The counties of Dickinson and Clay shall comprise one (1) district and elect one (1) representative.

The counties of Emmet and Palo Alto shall comprise one (1) district and elect one (1) representative.

The counties of Winnebago and Worth shall comprise one (1) district and elect one (1) representative.

The counties of Mitchell and Howard shall comprise one (1) district and elect one (1) representative.

The counties of Pocahontas and Humboldt shall comprise one (1) district and elect one (1) representative.

The counties of Ida and Sac shall comprise one (1) district and elect one (1) representative.

The counties of Audubon and Guthrie shall comprise one (1) district and elect one (1) representative.

The counties of Adair and Madison shall comprise one (1) district and elect one (1) representative.

The counties of Mills and Fremont shall comprise one (1) district and elect one (1) representative.

The counties of Montgomery and Adams shall comprise one (1) district and elect one (1) representative.

The counties of Taylor and Ringgold shall comprise one (1) district and elect one (1) representative.

The counties of Union and Clarke shall comprise one (1) district and elect one (1) representative.

The counties of Decatur and Wayne shall comprise one (1) district and elect one (1) representative.

The counties of Lucas and Monroe shall comprise one (1) district and elect one (1) representative.

The counties of Appanoose and Davis shall comprise one (1) district and elect one (1) representative.

The counties of Jefferson and Van Buren shall comprise one (1) district and elect one (1) representative.

The counties of Louisa and Muscatine shall comprise one (1) district and elect two (2) representatives.

The counties of Cerro Gordo, Webster, Story, Jasper, Johnson, Clinton, Wapello, Marshall, Des Moines, and Lee shall comprise one (1) district each and each shall elect two (2) representatives.

The county of Dubuque shall comprise one (1) district and shall elect three (3) representatives.

The county of Pottawattamie shall comprise one (1) district and shall elect four (4) representatives.

The counties of Scott, Woodbury, and Black Hawk shall comprise one (1) district each and each shall elect five (5) representatives.

The county of Linn shall comprise one (1) district and shall elect six (6) representatives.

The county of Polk shall comprise one (1) district and shall elect eleven (11) representatives.

All other counties shall comprise one (1) district each and each shall elect one (1) representative.

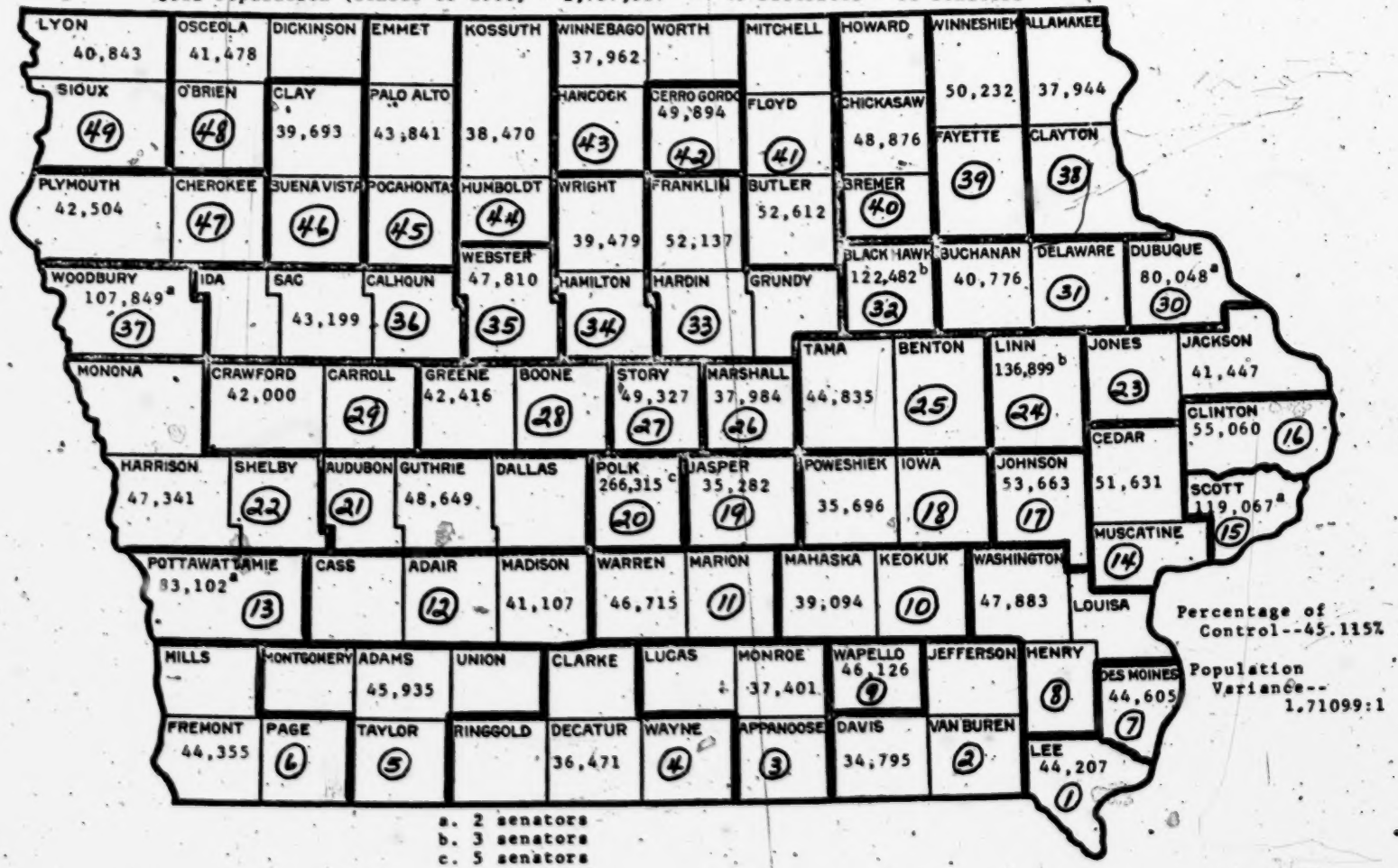
Robert D. Fulton
President of the Senate
Vincent B. Steffen
Speaker of the House

I hereby certify that this bill originated in the Senate and is known as Senate File 568, Sixty-first General Assembly.

Robert G. Moore
Secretary of the Senate

Approved _____, 1965.
Harold E. Hughes
Governor

IOWA SENATORIAL DISTRICTS--SENATE FILE 568, Sixty-first General Assembly
Iowa Population (Census of 1960) - 2,757,537 -- 49 Districts - 61 Senators



a. 2 senators
b. 3 senators
c. 5 senators

Percentage of Control--45.115%

Population Variance--1.71099:1

A83

HOUSE OF REPRESENTATIVES

Temporary Apportionment Plan Adopted by the 61st Iowa General Assembly and Known as Senate File 568

IOWA POPULATION (Census of 1960)—2,757,537

81 Districts—124 Representatives

District	Counties Within District	Population
1.	Lyon (14,468), Osceola (10,064)	24,532
2.	Dickinson (12,574), Clay (818,504)	31,078
3.	Emmet (14,871), Palo Alto (14,736)	29,607
4.	Winnebago (13,099), Worth (10,259)	23,358
5.	Mitchell (14,043), Howard (12,734)	26,777
6.	Pocahontas (14,234), Humboldt (13,156)	27,390
7.	Ida (10,269), Sac (17,007)	27,276
8.	Audubon (10,919), Guthrie (13,607)	24,526
9.	Adair (10,893), Madison (12,295)	23,188
10.	Mills (13,050), Fremont (10,282)	23,332
11.	Montgomery (14,467), Adams (7, 468)	21,935
12.	Taylor (10,288), Ringgold (7,910)	18,198
13.	Union (13,712), Clarke (8,222)	21,934
14.	Decatur (10,539), Wayne (9,800)	20,339
15.	Lucas (10,923), Monroe (10,463)	21,386
16.	Appanoose (16,015), Davis (9,199)	25,214
17.	Jefferson (15,818), Van Buren (9,778)	25,596
18.	Louisa—Muscatine (2 representatives)	44,130
19.	Cerro Gordo (2 representatives)	49,894
20.	Webster (2 representatives)	47,810
21.	Story (2 representatives)	49,327

District	Counties Within District	Population
22.	Jasper (2 representatives)	35,282
23.	Johnson (2 representatives)	53,663
24.	Clinton (2 representatives)	55,060
25.	Wapello (2 representatives)	46,126
26.	Marshall (2 representatives)	37,984
27.	Des Moines (2 representatives)	44,605
28.	Lee (2 representatives)	44,207
29.	Dubuque (3 representatives)	80,048
30.	Pottawattamie (4 representatives)	83,102
31.	Scott (5 representatives)	119,067
32.	Woodbury (5 representatives)	107,849
33.	Black Hawk (5 representatives)	122,482
34.	Linn (6 representatives)	136,899
35.	Polk (11 representatives)	266,315
36.	Kossuth	25,314
37.	Winneshiek	21,651
38.	Allamakee	15,982
39.	Sioux	26,375
40.	O'Brien	18,840
41.	Hancock	14,604
42.	Floyd	21,102
43.	Chickasaw	15,034
44.	Fayette	28,581
45.	Clayton	21,962
46.	Plymouth	23,906
47.	Cherokee	18,598

District	Counties Within District	Population
48.	Buena Vista	21,189
49.	Wright	19,447
50.	Franklin	15,472
51.	Butler	17,467
52.	Bremer	21,108
53.	Calhoun	15,923
54.	Hamilton	20,032
55.	Hardin	22,533
56.	Grundy	14,132
57.	Buchanan	22,293
58.	Delaware	18,483
59.	Monona	13,916
60.	Crawford	18,569
61.	Carroll	23,431
62.	Greene	14,379
63.	Boone	28,037
64.	Tama	21,413
65.	Benton	23,422
66.	Jones	20,693
67.	Jackson	20,754
68.	Harrison	17,600
69.	Shelby	15,825
70.	Dallas	24,123
71.	Poweshiek	19,300
72.	Iowa	16,396
73.	Cedar	17,791

District	Counties Within District	Population
74.	Cass	17,919
75.	Warren	20,829
76.	Marion	25,886
77.	Mahaska	23,602
78.	Keokuk	15,492
79.	Washington	19,406
80.	Henry	18,187
81.	Page	21,023

One state representative is elected from each of seventeen two-county representative districts.

One state representative is elected from each of forty-six one-county representative districts.

More than one state representative is elected from one two-county representative district.

More than one state representative is elected from each of seventeen one-county representative districts.

VARIATIONS IN POPULATION OF REPRESENTATIVE DISTRICTS

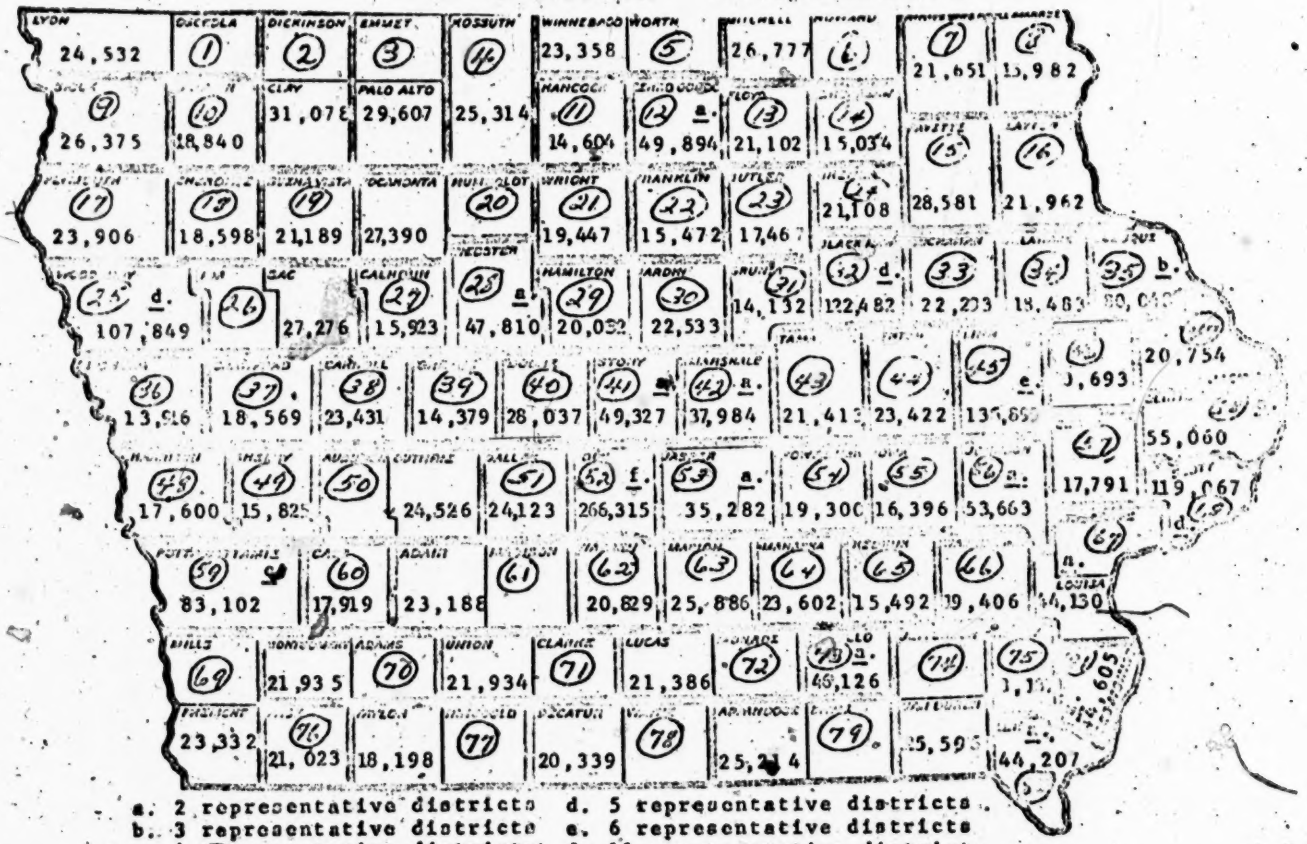
1. Single county districts electing one representative:
   a. Monona 13,916
   b. Fayette 28,581
2. Multi-county districts electing one representative:
   a. Taylor (10,288), Ringgold (7,910) 18,198
   b. Dickinson (12,574), Clay (18,504) 31,078

The seventeen most populous counties (Polk-Jasper) account for 1,379,720 residents or 50% of Iowa's population. These 17 counties receive 59 of the 124 House of Representative seats (47.6%) in this apportionment plan.

The 63 representatives who could theoretically control the 124 member House of Representatives represent 44.8% of the State's population. The number of residents represented by the 44.8% is 1,234,745.

As adopted from the Iowa Legislative Research Bureau report of April 17, 1964.

HOUSE OF REPRESENTATIVES
Temporary Apportionment Plan Adopted by Senate File 568
of the 61st Iowa General Assembly
Iowa Population (Census of 1960) - 2,757,537
81 Districts - 124 Representatives



a. 2 representative districts
b. 3 representative districts
c. 4 representative districts
d. 5 representative districts
e. 6 representative districts
f. 11 representative districts

A89

IOWA SENATORIAL DISTRICTS—SENATE FILE 568, 61st GENERAL ASSEMBLY

IOWA POPULATION (Census of 1960)—2,757,537
49 Districts—61 Senators

District	Counties Within District	Population
1.	Lee	44,207
2.	Davis (9,199), Jefferson (15,818) Van Buren (9,778)	34,795
3.	Appanoose (16,015), Lucas (10,923), Monroe (10,463)	37,401
4.	Clarke (8,222), Decatur (10,539), Ringgold (7,910), Wayne (9,800)	36,471
5.	Adams (7,468), Montgomery (14,467), Taylor (10,288), Union (13,712)	45,935
6.	Fremont (10,282), Mills (13,050), Page (21,023)	44,355
7.	Des Moines	44,605
8.	Henry (18,187), Louisa (10,290), Washington (19,406)	47,883
9.	Wapello	46,126
10.	Keokuk (15,492), Mahaska (23,602)	39,094
11.	Marion (25,886), Warren (20,829)	46,715
12.	Adair (10,893), Cass (17,919), Madison (12,295)	41,107
13.	Pottawattamie (2 Senators)	83,102
14.	Cedar (17,791), Muscatine (33,840)	51,631
15.	Scott (2 Senators)	119,067
16.	Clinton	55,060
17.	Johnson	53,663
18.	Iowa (16,396), Poweshiek (19,300)	35,696

District	Counties Within District	Population
19.	Jasper	35,282
20.	Polk (5 Senators)	266,315
21.	Audubon (10,919), Dallas (24,123), Guthrie (13,607)	48,649
22.	Harrison (17,600), Shelby (15,825), Monona (13,916)	47,341
23.	Jackson (20,754), Jones (20,693)	41,447
24.	Linn (3 Senators)	136,899
25.	Benton (23,422), Tama (21,413)	44,835
26.	Marshall	37,984
27.	Story	49,327
28.	Boone (28,037), Greene (14,379)	42,416
29.	Carroll (23,431), Crawford (18,569)	42,000
30.	Dubuque (2 Senators)	80,048
31.	Buchanan (22,293), Delaware (18,483)	40,776
32.	Black Hawk (3 Senators)	122,482
33.	Hardin (22,533), Franklin (15,472), Grundy (14,132)	52,137
34.	Hamilton (20,032), Wright (19,447)	39,479
35.	Webster	47,810
36.	Calhoun (15,923), Ida (10,269), Sac (17,007)	43,199
37.	Woodbury (2 Senators)	107,849
38.	Allamakee (15,982), Clayton (21,962)	37,944
39.	Fayette (28,581), Winneshiek (21,651)	50,232
40.	Bremer (21,108), Chickasaw (15,034), Howard (12,734)	48,876

District	Counties Within District	Population
41.	Floyd (21,102), Mitchell (14,043), Butler (17,467)	52,612
42.	Cerro Gordo	49,894
43.	Hancock (14,604), Winnebago (13,099), Worth (10,259)	37,962
44.	Humboldt (13,156), Kossuth (25,314)	38,470
45.	Emmet (14,871), Palo Alto (14,736), Pocahontas (14,234)	43,841
46.	Buena Vista (21,189), Clay (18,504)	39,693
47.	Cherokee (18,598), Plymouth (23,906)	42,504
48.	Dickinson (12,574), O'Brien (18,840), Osceola (10,064)	41,478
49.	Lyon (14,468), Sioux (26,375)	40,843

One state senator is elected from each of two four-county senatorial districts.

One state senator is elected from each of fourteen three-county senatorial districts.

One state senator is elected from each of sixteen two-county senatorial districts.

One state senator is elected from each of ten single-county senatorial districts.

More than one senator is elected from each of seven single-county senatorial districts.

DISTRICTS ELECTING MORE THAN ONE SENATOR

County	Total Population	No. of Senators	No. of Persons Represented by Each Senator
Dubuque	80,048	2	40,024
Pottawattamie	83,102	2	41,551
Woodbury	107,849	2	53,925
Scott	119,067	2	59,534
Black Hawk	122,482	3	40,827
Linn	136,899	3	45,633
Polk	266,315	5	53,263
	895,762		

VARIATIONS IN POPULATION OF SENATORIAL DISTRICTS

1. All districts:	
a. Davis (9,199), Jefferson (15,818), Van Buren (9,778)	34,795
b. Scott	59,534
2. Single-county districts electing more than one Senator:	
a. Dubuque (2 Senators)	40,024[1]
b. Scott (2 Senators)	59,534[1]
3. Singly-county districts electing one Senator:	
a. Jasper	35,282
b. Clinton	55,060
4. Two-county districts electing one Senator:	
a. Iowa (16,396), Poweshiek (19,300)	35,696
b. Cedar (17,791), Muscatine (33,840)	51,631

1. Number of constituents represented by each Senator.

5. Three-county districts electing one Senator:

   a. Davis (9,199), Jefferson (15,818), Van Buren (9,778) — 34,795

   b. Floyd (21,102), Mitchell (14,043), Butler (17,467) — 52,612

6. Four-county districts electing one Senator:

   a. Clarke (8,222), Decatur (10,539), Ringgold (7,910), Wayne (9,800) — 36,471

   b. Adams (7,468), Montgomery (14,467), Taylor (10,288), Union (13,712) — 45,935

The 17 most populous counties (Polk-Jasper) with 1,379,720 residents or 50% of Iowa's population comprise 17 senatorial districts in this redistricting plan. The 17 senatorial districts receive 29 of the 61 senate seats (47.54%) in this redistricting plan.

The 31 least populous districts (Davis-Jefferson-Van Buren-Webster), excluding districts in which more than one senator is elected, account for 1,281,811 residents or 46.48% of the population of the State. These 31 districts receive 31 of the 61 senate seats (50.82%) in this redistricting plan.

The 31 senators representing the least number of persons are elected from 27 districts (Davis-Jefferson-Van Buren-Fremont-Mills-Page). These 31 senators represent 1,244,076 or 45.115% (percentage of control) of the population of the State and comprise 50.82% of the membership of the Senate in this redistricting plan.

Population variance between the most populous senatorial district (Scott—59,534) and the least populous district (Davis-Jefferson-Van Buren—34,795)—1.71099:1.

APPENDIX D

Constitution of the State of Iowa

Article I.

Laws uniform. Sec. 6. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Article III.

Districts. Sec. 37. When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district.

Senators—number—method of apportionment. Sec. 34. The number of senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties according to the number of inhabitants in each.

Senators—representatives—number—apportionment—districts. Sec. 35. The Senate shall not consist of more than fifty members, nor the House of Representatives of more than one hundred; and they shall be apportioned among the several counties and representative districts of the State, according to the number of inhabitants in each, upon ratios to be fixed by law; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled

to one representative; and any one county containing in addition to the ratio fixed by law, one-half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed.

Ratio of representation. Sec. 36. At its first session under this Constitution, and at every subsequent regular session, the General Assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 321

W. E. McCULLOCH, Auditor of Polk County, Iowa, and HAROLD E. HUGHES, Governor of State of Iowa, GARY L. CAMERON, Secretary of State of State of Iowa, LORNE R. WORTHINGTON, Auditor of State of Iowa, PAUL FRANZENBURG, Treasurer of State of Iowa, KENNETH E. OWEN, Secretary of Agriculture of State of Iowa, in Their Elective Capacities and Also Collectively and Individually As the Executive Council of the State of Iowa, and LAWRENCE F. SCALISE, Attorney General of State of Iowa, and ROBERT D. FULTON, Lieutenant Governor of State of Iowa,

Petitioners,

vs.

ELIZABETH KRUIDENIER, ROBERT R. RIGLER, LAMAR FOSTER, SR., and THOMAS S. HEFLEY,

Respondents.

RESPONDENTS' BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI

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W. E. McCULLOCH, Auditor of Polk County, Iowa, and HAROLD E. HUGHES, Governor of State of Iowa, GARY L. CAMERON, Secretary of State of State of Iowa, LORNE R. WORTHINGTON, Auditor of State of Iowa, PAUL FRANZENBURG, Treasurer of State of Iowa, KENNETH E. OWEN, Secretary of Agriculture of State of Iowa, in Their Elective Capacities and Also Collectively and Individually As the Executive Council of the State of Iowa, and LAWRENCE F. SCALISE, Attorney General of State of Iowa, and ROBERT D. FULTON, Lieutenant Governor of State of Iowa,

Petitioners,

vs.

ELIZABETH KRUIDENIER, ROBERT R. RIGLER, LaMAR FOSTER, SR., and THOMAS S. HEFLEY,

Respondents.

RESPONDENTS' BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI

Respondents pray that this United States Supreme Court not issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Iowa entered in the above entitled case on April 15, 1966.

JURISDICTION

Petitioners' statement of grounds of jurisdiction on page 2 of the petition for writ of certiorari is erroneous because it omits respondents' separate and independent Divisions I and III of their original petition. (R. 3-25, 43-55, 299-301). In these separate divisions respondents prayed that the 1964 and 1965 Iowa temporary reapportionment plans violated Article I, Sec. 6, of the Iowa Constitution. The state court judgment rests on two grounds, one of which is the State Constitutional issue raised by respondents. See 142 N.W.2d 370-371. (Pages A-56—A-58 in petitioners' appendix A).

PETITIONERS' STATEMENT OF QUESTIONS

Petitioners' statement of questions presented is erroneous because: (A) Petitioners omit the questions presented by Divisions I and III of the original petition of respondents, which pertained solely to state constitutional grounds; (B) Petitioners in the last paragraph on their page 3 misstate the record in the case. This record was uncontradicted and showed much more than mere "advantages to voter (sic)" as claimed by petitioners. The record clearly showed invidious discrimination in violation of both the state and Federal constitution: (1) against rural minorities in Polk County (Des Moines); (2) against rural minorities in other multi-member district counties; (3) against citizens desiring to be candidates for the House of Representatives and for the State Senate in Polk County; (4) because of the bloc vote influence of Polk County citizens through eleven representatives and five senators elected at large; (5) because of the length of the ballot where in Polk County fifty candidates ran at large in the June, 1964, State Primary Election for nomination for the Iowa House of Representatives;

(6) because of the lack of uniformity of operation of laws wherein Polk County citizens have the power to vote for eleven representatives and five senators in contrast to citizens of single-member districts; (7) because of the lack of identifiable constituencies of the multi-member district; (8) because of submergence of political minority groups.

Thus, in Divisions I and III of the original petition of respondents, the state court was faced with the question:

> Whether the 1964 and 1965 Iowa Temporary Reapportionment Plans under the record of the case showing the aforementioned invidious discrimination violated Article I, Sec. 6, of the Constitution of the State of Iowa which declares that "All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

In addition, Divisions II and IV of the original petition of respondents presented the question of whether or not under the record showing the aforementioned discrimination the 1964 and 1965 temporary reapportionment plans violated the equal protection clause of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF CASE

This is a non-partisan declaratory judgment class action brought by respondents to determine the constitutionality under the Constitution of the State of Iowa and the Constitution of the United States of the 1964[1] and 1965[2] Iowa temporary reapportionment plans.

---

1. Chapter 1, Acts of the 60th General Assembly (Ex. Sess.) (Iowa 1964).

2. Chapter 88, Acts of the 61st General Assembly (Iowa 1965).

The respondents themselves and the witnesses testifying on behalf of respondents included both Democrats and Republicans, some of whom lived in multi-member districts and some of whom lived in single-member districts, and many of whom had been very active in working toward fair reapportionment in Iowa to give urban voters a full share of representation in the State Legislature.

Although the original petition was commenced in separate divisions, one involving state constitutional grounds and the other Federal constitutional grounds, the newly appointed trial court judge ignored every legal precedent to the contrary and held that the state court had no jurisdiction to determine the constitutionality of state apportionment laws under the State and Federal Constitutions. This decision was reversed by the Supreme Court of Iowa in *Kruidenier* v. *McCulloch,* 136 N.W.2d 546 (Iowa 1965), and the case was remanded for trial before the same trial court.

The evidence of respondents was uncontradicted and sustained the allegations of Divisions I and III that the temporary reapportionment plans violated Article I, Section 6, of the Iowa Constitution.

On November 5, 1965, the same trial court that earlier ruled it had no jurisdiction in the matter once again ruled against respondents on all grounds. This ruling was reversed on April 15, 1966, by the Iowa Supreme Court in *Kruidenier* v. *McCulloch,* 142 N.W.2d 355 (Iowa 1966). In a unanimous opinion the Iowa Supreme Court held that the record showed that in the multi-member district of Polk County the operation of the temporary reapportionment plan violated both Article I, Section 6, of the Iowa Constitution and the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. At 142 N.W.2d 369 (Petitioners' Appendix A-54), the Iowa

Supreme Court declared: "The 1965 temporary apportionment plan contains objections to both state and federal standards required for equal protection as disclosed by the record in Polk County, the only multi-member district before us in this case."

In addition, by a five to four majority in Division IX-A the court held that the 1965 temporary reapportionment plan did not have equal operation between the two classes of citizens—those who reside in single-member districts and those who reside in multi-member districts—as to all multi-member district counties and therefore violated Article I, Section 6, of the Bill of Rights of the Constitution of Iowa. (142 N.W.2d 370-371, Petitioners' Appendix A-56—A-58).

QUESTIONS PRESENTED

1. Where a state court judgment rests upon two grounds, one of which is non-Federal in character, does the United States Supreme Court have jurisdiction to review if the non-Federal ground is independent of the Federal ground and adequate to support the judgment?

2. Does the judgment of the Supreme Court of Iowa rest upon an independent and adequate non-Federal ground?

REASONS FOR NOT GRANTING THE WRIT

The judgment of the Iowa Supreme Court rests upon two grounds, one of which is Federal and the other non-Federal in character. This non-Federal ground is independent of the Federal ground and is adequate to support the judgment, and, therefore, the writ of certiorari should not be granted. *Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487, 85 S. Ct. 871 (1965).

Division IX-A of the majority opinion (142 N.W.2d 370, petitioners', Appendix A-56) deals wholly with the non-Federal ground on which the judgment rests: Article I, Section 6, of the Bill of Rights of the Iowa Constitution which declares that

> "All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

The final paragraph of Division IX-A of the opinion of the Iowa Supreme Court vividly demonstrates the nature of the independent ground at 142 N.W.2d 371:

> "Any scheme of legislative apportionment in which there are multi-member districts and single-member districts in the same house impairs the right of a resident of a single-member district to have the laws operate uniformly as guaranteed by section 6, Article I of the Constitution of Iowa. Such impairment violates his constitutional rights unless it can be shown such peculiar circumstances exist that a rational plan of apportionment cannot be achieved by using all single-member districts. We do not foreclose the possibility that in some instances there may be legitimate considerations which would make some multi-member districts constitutionally permissible."

Perhaps this *per se* concept of uniformity of operation of laws under the Iowa State Constitution is different from that enunciated by the United States Supreme Court in interpreting the Federal Constitution, albeit that under the record in this case the respondents have shown that the temporary reapportionment plan also violates the Federal Constitution. But regardless of how this United States Supreme Court might decide any Federal constitutional issue, such holding would be moot in light of the fact that the

Iowa State Constitution requires that all legislative districts be single-member districts. And it is the Iowa Supreme Court that is the final arbiter of state constitutional questions, unless its interpretation of the State Constituion violates basic Federal Constitutional rights.

One of the most recent statements of the basic United States Supreme Court rule on accepting jurisdiction is in the case of *Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487, 85 S. Ct. 493 (1965). That case involved the dismissal of a writ of certiorari in an Indiana case where the Supreme Court of Indiana held that an ordinance of the City of Gary, Indiana, was constitutionally invalid because it "purported to authorize an unlawful and unconstitutional apportionment of property rights without payment of compensation". See *Indiana Toll Road Commission* v. *Jankovich,* 193 N.E.2d 237 at 242.

Although there were two independent constitutional grounds raised by the appellants in that case, the opinion of the Indiana Supreme Court did not go nearly as far as the opinion of the Iowa Supreme Court in the case at bar in separating these two grounds. For instance, at 193 N.E.2d 238, in stating the issues the Indiana Supreme Court said:

> ". . . does the ordinance purport to effect a taking of private property for public use in violation of the provisions of Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States; . . .'

And at 193 N.E.2d 239, the Indiana Supreme Court also combined the state and federal grounds:

> "The fact that private property may not be taken for public use without compensation is not debatable. However, in determining whether this constitutional

> protection has been violated by the ordinance under consideration, two main issues arise: (1) whether air space above land is a constitutionally protected property right, and (2) whether in the instant case there has been a constitutionally proscribed taking."

In concluding that the Gary, Indiana, ordinance was invalid, the Indiana Supreme Court held that there was "an unlawful and unconstitutional appropriation of property rights", without separating its holdings on state and federal grounds.

Now, let us contrast that case with the Iowa Supreme Court opinion in *Kruidenier* v. *McCulloch*. In the case at bar the pleadings raised, in separate divisions, questions pertaining to the State Constitution. (R. 3-25, 43-55, 299-300, 301). We have separate divisions in the opinion pertaining to the State Constitution. (142 N.W.2d 370-371). And finally, we have a specific conclusion in the opinion that the temporary reapportionment plan violates Article I, Section 6 of the Constitution of Iowa. (142 N.W.2d 375).

Moreover, that the Supreme Court of Iowa intended to rest its judgment on the independent state ground is made clear by the rejection by the majority of the Iowa Court of the language of the dissent of Justice Mason in Division IX of Justice Mason's opinion. Justice Mason stated:

> "We next combine for consideration plaintiffs' contention single-member districts are required by section 6, Article I, of the state constitution and their third proposition the multi-member constituency apportionment scheme of the temporary reapportionment plan violates section 1, Amendment 14 of the federal constitution." (142 N.W.2d 362).

The majority, in Justice Stuart's opinion, rejected this combined consideration of the state and federal grounds

involved and carefully set apart in Division IXA the majority's consideration of the state ground from the majority's consideration in Division IXB of the Federal ground. Therefore, it is clear that the Iowa Court intended to rest its judgment independently on the non-federal ground and that it felt no compulsion from Federal decisions in so resting its judgment. See 142 N.W.2d 370-371.

The rule restated in the Jankovich case has as its fundamental basis the traditional rule laid down in *Murdock* v. *City of Memphis*, 87 U.S. 590 (1874) at 634-635:

> "But in the other cases supposed, why should a judgment be reversed for an error in deciding the Federal question, if the same judgment must be rendered on the other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below, after they have corrected the error in the Federal question?
>
> "We have already laid down the rule that we are not authorized to examine these other questions for the purpose of deciding whether the State court ruled correctly on them or not. We are of opinion that on these subjects not embraced in the class of questions stated in the statute, we must receive the decision of the State courts as conclusive."

Then, the United States Supreme Court laid down propositions for asserting jurisdiction, one of which was the inquiry of ". . . whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue." 87 U.S. at 636.

And in *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U.S. 157 (1917) at 164, the court dismissed a writ of error in a case which involved both Federal and state questions with the following language:

> "Thus, we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it." (Citations omitted).

In *Senn* v. *Tile Layers Union*, 301 U.S. 468 (1936), the Supreme Court of Wisconsin decided issues concerning the application of the State Constitution and the Wisconsin Labor Code. At 301 U.S. 477, this court stated:

> "Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive."

Similarly, the issues in this case involve the construction and application of a state apportionment statute and the Constitution of the State. As to these issues, the judgment of the Iowa Supreme Court is conclusive, unless its judgment has the effect of violating some Federal constitutional rights.

Surely there is nothing in the opinion of the Supreme Court of Iowa which violates any Federal constitutional right of petitioners or of any other Iowa citizen. As a matter of fact, petitioners do not claim that the holding of the Iowa Supreme Court will result in the violation of any rights guaranteed by the Federal Constitution.

Rather, they seek to assert that the decision of the Supreme Court under the record in the case, is based only on Federal constitutional grounds. Such assertion is erroneous.

Division III of plaintiffs' petition pertained to the unconstitutionality of the 1965 temporary reapportionment plan under the Constitution of the State of Iowa. (R. 43-55; R. 301). Paragraph 6 of Division III has twelve subparagraphs alleging specific grounds of unconstitutionality, all of which are supported by uncontradicted evidence in the record.

For instance, Subdivisions A and B pertain solely to the violation of the Iowa Constitution by provisions of the temporary reapportionment plans allowing Polk County citizens to have the right to vote for five state senators and eleven state representatives.

Uncontradicted testimony of Plaintiff Elizabeth Kruidenier, a member of the Iowa Civil Rights Commission and a person who has been very active in Des Moines civic affairs, supports this proposition. Mrs. Kruidenier is an active member of the League of Women Voters and has also lobbied in favor of civil rights and fair employment practice legislation. She testified that as a citizen of Polk County with 11 representatives and 5 senators at large, her "influence carries a great deal more weight" than a lobbyist or citizen from a county that has one representative and one senator. (R. 128-132). No testimony of defendants contradicted this evidence.

Respondents' Subdivision D pertains solely to the lack of uniformity of operation of laws required by the State Constitution of Iowa because of the length of the ballot. The uncontradicted testimony of respondents supporting this proposition included the following:

(1) Plaintiff, Elizabeth Kruidenier, who voted in the Democratic primary, testified that there were 33 Democratic candidates, all running at large. At rallies candidates spoke briefly, a minute or a minute and a half. She said that even as a member of the League of Women Voters who was supposed to be informed, she did not know most of the candidates. From her observation, voters generally were confused. (R. 129-130).

(2) Kate Goldman, a Republican candidate for state representative, was another witness who testified on this issue. Mrs. Goldman is a member of the Iowa Citizens Council on Crime and Delinquency and has also been very active in Des Moines civic affairs. "There was very little opportunity for any kind of a platform experience in getting to the voters simply because of the total number of candidates running in the primary, which was well over 50 for the House and Senate." (R. 208-211; R. 214-215).

(3) Finally, Professor Russell M. Ross, the outstanding authority in Iowa on municipal and state governmental problems, testified concerning the "severe strain on the voters' capacity to distinguish intelligently among the various candidates" that the at large election of multi-member representatives places on the average voter. (R. 268-270).

All of this testimony was uncontradicted by petitioners.

Respondents' Subdivisions E and F pertain solely to the lack of uniformity of operation of laws as shown by bloc voting and the submergence of minority groups.

The record shows that of the 33 candidates for state representative in the Polk County Democratic primary, there were two slates, one with 6 candidates and one with 8 candidates. Of the 14 candidates in the Democratic primary who received the most votes, 13 of the candidates

were on either one of the two slates. As for the fourteenth, he was a former Iowa football star and television and radio commentator for Iowa football games (R. 135), who changed his affiliation from Republican to Democrat within two or three weeks before the primary. (R. 132-134; R. 330-331 and Exhibit 10).

The bloc voting also occurred to wipe out from among the nominees of the Democrats the three candidates from Polk County who did not live in either Des Moines or West Des Moines. Finally, the bloc voting occurred in the general election where, in almost every multi-member representative district, the variance between the highest and lowest candidate of the victorious party approximated 10% or less, and the variance between the highest and lowest candidate of the losing party also approximated 10%. In other words, the candidates of each party ran substantially as a slate. For instance, in Black Hawk County, where 5 representatives were elected at large, the votes of the 5 victorious Democratic candidates ranged from 27,736 to 29,270, and the range of votes for the defeated Republican candidates were from 20,043 to 20,976. (R. 308-309 and Exhibit 11).

State Senator David Stanley testified concerning the invidious discrimination that arises because of bloc voting. (R. 151-152; 156-158). His testimony was also supported by Mrs. Goldman and Mayor Leslie J. (Sam) Wise, mayor of a Polk County rural community of Altoona. (R. 232-235; R. 204).

The uncontradicted record also showed that in Polk County there are only 9,130 more registered Democrats than registered Republicans. Yet, because there were no single member districts, not one Republican was elected as either a State Representative or State Senator. (R. 15-16; R. 100-101). Mrs. Goldman received the highest

number of votes of any Republican candidate for state representative from Polk County—40,544 votes. (R. 217). After the election she analyzed the Polk County vote on a precinct by precinct basis. This analysis showed that in the rectangular area known as the "West Side", going from the north city limits to the south city limits and from the west city limits of 63rd Street east to 30th Street, which embraces 28% of the Polk County vote, Mrs. Goldman ran ahead of every candidate of either party. If these precincts were to be sub-districted, it would be equivalent to three representatives. (R. 216-218). In these 23 contiguous precincts in the rectangular area known as the Des Moines West Side, there are 21,748 registered Republicans compared to 12,396 registered Democrats and 3,459 Independents. (R. 218-220; R. 228).

Similarly, Attorney Robert Mannheimer, a widely known civic leader in Des Moines who ran as one of the Republican candidates for state senator, also received more votes in these 23 West Side precincts than his opponent. (R. 235-237).

Petitioners, on page 7 of the petition for certiorari, misstate this aspect of the record. The evidence was not that "one Republican representative * * * could have been elected from Polk County if a subdistrict had been laid out in a particular area * * *;" according to the uncontradicted record in the case, with the exception of one county, it would be impossible to gerrymander the subdistricts so as to preclude the minority party from at least one representative. (R. 288-289).

Professor Ross and Senator Stanley also testified on this issue. (R. 268-270; R. 162-165).

Mayor Sam Wise of Altoona who himself was a candidate in the Democratic primary, testified, also without contradiction:

"I believe it would be necessary to subdistrict because it's just pretty nearly impossible for anybody in our area or in these rural-oriented areas to both financially and physically to reach the Des Moines voter." (R. 204-207).

Respondents' subdivision H pertained solely to the lack of uniformity of operation of laws faced by the citizen in the single-member district who desires to influence legislation. For instance, Mrs. Goldman lives within a few miles of the Warren County line which separates the multi-member district of Polk County from the single-member district of Warren County. She testified without contradiction:

"As an amateur lobbyist, I have lobbied in about three sessions of the State Legislature trying to influence passage of legislation. I lobbied for revision of the Juvenile Code. I lobbied for work relief for County prisoners. I lobbied for the Child Abuse Bill, and I guess I did a little work on a few others, but those were my primary bills I worked on in the last session. I also worked on the first enactment of the Civil Rights Bill, the Fair Employment Practices Bill, that was in the 60th General Assembly in 1963.

"Then, in 1965 in the last session, I also worked in the area of Civil Rights and lobbied on behalf of establishing the Commission on Human Rights. . . .

"In terms of hours, when I was lobbying for the first enactment of the Fair Employment Practices Bill, that was almost a full-time job when I would go over there on an every-day basis."

She stated that as a person who had been an amateur lobbyist she felt that if a special interest group in Polk County were in favor of legislation and a special interest group in neighboring Warren County were against it, the Polk County special interest group would obviously have

an advantage because it would be able to influence 11 votes for state representative as opposed to the one vote for state representative that the Warren County group could directly influence. (R. 222-226).

Once again, defendants had no evidence to the contrary.

Subdivisions J and K pertained solely to the lack of uniformity of operation of laws faced by would-be candidates for the state legislature in the large multi-member district.

This proposition is almost self-evident. The plaintiff Elizabeth Kruidenier herself considered being a candidate in the Democratic primary, but because of the campaign burdens in a large district she decided not to run. (R. 132). Mrs. Goldman also testified without contradiction on this issue. (R. 222, R. 227-228, R. 232).

According to Mayor Wise of Altoona, "I just didn't have the time or the financial resources to reach the Des Moines voters." (R. 204).

Professor Ross and newspaper publisher Lester J. Hamilton also testified without contradiction on this issue. (R. 265-267, R. 272; R. 254).

Subdivision K showed that the Iowa temporary reapportionment plan operates to minimize and cancel out the voting strength of those portions of the voting population of Polk County not included within the corporate limits of the City of Des Moines and the City of West Des Moines and also operates to minimize and cancel out the voting strength of political elements of the voting population.

The uncontradicted record showed that no Democratic candidate for State Representative from outside the corporate limits of the Cities of Des Moines or West Des Moines

was nominated in the primary. There was no representative from the rural portion of Polk County that was elected in the general election. Also, even though there were only 9,130 more registered Democrats than registered Republicans in Polk County, there is not even one Republican state senator or representative from Polk County with its total population of 266,315. (R. 15-16; R. 100-101; Exhibit 11).

The problems of the rural-oriented element of the portions of Polk County outside the corporate limits of Des Moines and West Des Moines is vividly illustrated by the uncontradicted testimony of newspaper publisher Lester Hamilton from the suburban community of Urbandale and Mayor Leslie J. Wise of Altoona, both of whom were active in the Democratic Party organization.

> "Having watched the political races in Polk County for the last 16 or 17 years, I feel that the present setup leaves an Urbandale voter without a vote." (R. 250).

> "I believe it would be necessary to subdistrict because it's just pretty nearly impossible for anybody in our area or in these rural-oriented areas to both financially and physically to reach the Des Moines voter. To the best of my knowledge, there would be no way to be nominated, other than if you were on some kind of a slate or something like that." (R. 204-205).

Other uncontradicted testimony included that of Senator Stanley (R. 164), and Mrs. Goldman, who in the 23 Des Moines west side precincts which comprise 28% of the total vote in Polk County and where Republicans outnumber the Democrats nearly two to one, received substantially more votes than any other candidate for state representative. (R. 218-220).

Subdivision L showed that in state senatorial districts entitled to more than one senator and in state representa-

tive districts entitled to more than one state representative, the temporary reapportionment plan operates to minimize and cancel out the voting strength of those portions of the voting population not included within the corporate limits of cities in said districts and further operates to minimize and cancel out the voting strength of political elements of the voting population.

On cross-examination, Lieutenant Governor Fulton admitted that in his home county of Black Hawk, which has a total population of 122,482, all elected representatives come from the adjoining cities of Waterloo (71,755) and Cedar Falls (21,195), leaving nearly 30,000 people in other portions of the county without their own representative. As a matter of fact, even all of the defeated Republican candidates were from Waterloo or Cedar Falls. (R. 307-309).

According to Exhibit 11, not one member of a minority political party was elected to the State House of Representatives from any multi-member representative district. The range of votes for defeated and victorious candidates within each party showed the overwhelming tendency of bloc voting. In and of itself, the bloc vote minimizes and cancels out the voting strength of political elements of the voting population.

The foregoing is a statement of some of the highlights of the record upon which the Opinion of the Iowa Supreme Court held that the 1965 temporary reapportionment plan violates Article I, Section 6 of the Bill of Rights of the Iowa Constitution. The record of respondents is totally uncontradicted by petitioners. This record forms an ample foundation of the independent state grounds of the Iowa Supreme Court; and this record makes clear that, during all stages of this case, from the original pleadings to the decision of the Iowa Supreme Court, state grounds for

attack by the respondents and for decision by the Iowa Court were carefully delineated from any Federal questions also involved.

Petitioners complain about the Iowa Supreme Court's interpretation of Article III, Section 37, of the State Constitution and assert, on page 23 of their petition, that it ". . . was either compelled by its interpretation of the equal protection clause of the Fourteenth Amendment, or was not broad enough to support its interpretation". Petitioners extract only a portion of this constitutional provision, which, properly and completely set forth, declares:

> "When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district."

Since this provision was in a single sentence (as contrasted to a somewhat similar provision in the Colorado Constitution in separate sentences), the Iowa Supreme Court held that the entire section was governed by the introductory clause, "Where a Congressional, senatorial, or representative district shall be composed of *two or more counties* . . ." (Emphasis supplied).

Furthermore, the Iowa Supreme Court held that such interpretation harmonized Section 37 of Article III with Section 6 of Article I. Thus, at 142 N.W.2d 361-362, the Iowa Supreme Court declared:

> "Defendants assert and the trial court held this provision prohibits subdividing a county in forming a senatorial or representative district wholly within that county, i. e., what is commonly called subdistricting. Plaintiffs contend, however, section 37 prohibits only dividing a county and attaching the divided part to all

or part of another county or other counties in forming a legislative district. Otherwise stated, the contention is that section 37, supra, does not proscribe establishing more than one district within a single county so long as it is not combined with territory outside the county.

We think the construction of section 37 for which plaintiffs contend is the more reasonable and hence adopt it. There is no division of a county within the meaning of this section as long as a senatorial or representative district is entirely within a specific county. Only if a senatorial or representative district were to take in a portion of two or more counties would there be a 'divided' county in the formation of a district which is prohibited by this section. It is our duty to harmonize this section, if fairly possible, with other provisions of our state constitution, particularly, as applied to the present controversy, section 6, Article I thereof, providing for uniformity and equality in legislative enactments. 16 Am. Jur. 2d, Constitutional Law, sections 66, 67. The construction we give section 37, Article III, supra, gives full effect to both these provisions."

As stated in *Senn* v. *Tile Layers Union,* 301 U.S. 468 (1936), the decision of the state court on matters involving interpretation of the state Constitution is binding on this United States Supreme Court, unless there is a violation of a Federal constitutional right.

Petitioners assert that the Iowa Supreme Court's interpretation of the requirements of Article I, Section 6, is without prior legal foundation. Assuming arguendo this were true, the Iowa Supreme Court is still the final arbiter of state constitutional questions. However, petitioners' assumption is wrong as shown by the recent Iowa Supreme Court decision of *Chicago & Northwestern Railway Co.* v. *Fachman,* 255 Iowa 989, 125 N.W.2d 210 (1963),

which involved an interpretation of Article I, Section 6, of the Iowa Constitution. In a unanimous opinion the Iowa Supreme Court stated at 255 Iowa 996-997, 125 N.W.2d 214:

> "We have said that the provision of Section 6, Article I, of the State Constitution is the 'equality' provision, and that under our system of free constitutional government the courts have a high duty to see to it that legislation does not violate the equality of rights guaranteed by the Constitution. (Citations omitted). . . .
>
> "It is also elementary that membership in a class is determined by the possession of the traits which define that class. Thus, a corporation is a member of a class if and only if it possesses the traits which define a class. Whatever the defining characteristics of a class may be, every member of that class will possess those characteristics. It is often said a reasonable classification is one which includes all who are similarly situated, and none who is not."

Under the record in this case, the decision of the Iowa Supreme Court in *Kruidenier* v. *McCulloch* fell within the framework of this overriding philosophy.

Petitioners complain about the Supreme Court's lack of reference to the findings of the trial court, a newly appointed judge. The trial court ignored the record in this case, just as it ignored every legal precedent to the contrary in holding that state courts have no jurisdiction in determining the constitutionality of state reapportionment laws under the State Constitution.

Petitioners assert that the decision of the Iowa Supreme Court was a "partisan" one. In the first place, the Iowa Supreme Court was unanimous in its ruling pertaining to Polk County. And in the second place, the State of Iowa has a non-partisan judiciary.

Be that as it may, the crucial issues for determination by this Supreme Court are:

1. Where a state court judgment rests upon two grounds, one of which is non-federal in character, does the United States Supreme Court have jurisdiction to review if the non-federal ground is independent and adequate to support the judgment? Respondents submit the answer to this question is, "No."

2. Does the judgment of the Supreme Court of Iowa in this case of *Kruidenier* v. *McCulloch* rest upon an independent and adequate non-federal ground? Respondents submit that the answer to this question is, "Yes."

CONCLUSION

Article I, Section 6 of the Bill of Rights of the Iowa Constitution declares that "all laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Division III of the petition of respondents alleges that the 1965 Iowa temporary reapportionment plan violates Article I, Section 6 of the Constitution of the State of Iowa. The record in this case supports this allegation. The Iowa Supreme Court in a separate division in its opinion specifically held that the 1965 temporary reapportionment plan violated Article I, Section 6 of the Iowa Constitution. This was an independent ground for the decision of the Iowa Supreme Court in this case. There is ample evidence in the record in this case to support this independent ground. It is "the settled rule that where the judgment of a state court rests on two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-

federal ground is independent of the federal ground and adequate to support the judgment.", *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 85 S. Ct. 493 (1965). Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Office Supreme Court, U.S.
FILED
AUG 23 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 321

W. E. McCULLOCH, Auditor
of Polk County, Iowa, et al
State of Iowa
Petitioners,
vs.
ELIZABETH KRUIDENIER, et al
Respondents.

SUPPLEMENT TO PETITION FOR CERTIORARI

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This Supplement to the Petition for Certiorari in the above entitled case is filed solely for the purpose of correcting an inaccurate statement contained in said Petition and including the correct state constitutional amendments, which were previously filed as Appendix D to the original petition.

STATEMENT OF CASE

On page nine of the Petition, the following language appears: "In 1961 the first apportionment of the State of Iowa in the Twentieth Century occurred and was limited by the amendments of 1904 and 1928 to the constitution."

This statement is inaccurate in that in the years 1941 and 1953 the Senate was reapportioned in a limited degree. The apportionment plans therein were unsubstantial, and no effort was made to reapportion on an equal population basis.

APPENDIX D

The state constitutional provisions which appeared in the original Petition were erroneous in that they did not reflect the Amendments of 1904 and 1928. The correct provisions are here set forth:

> "Senators -- number -- method of apportionment. SECTION 34. The Senate shall be composed of fifty members to be elected from the several senatorial districts, established by law and at the next session of the general assembly held following the taking of the state and national census, they shall be apportioned among the several counties or districts of the state, according to population as shown by the last preceding census, but no county shall be entitled to more than one (1) senator.
>
> "Representatives -- number -- apportionment. SECTION 35. The House of Representatives shall consist of not more than one hundred and eight members. The Ratio of representation shall be determined by dividing the whole number of the population of the state as shown by the last preceding state or national census,

by the whole number of counties then existing or organized, but each county shall constitute one representative district and be entitled to one representative, but each county having a population in excess of the ratio number, as herein provided of three fifths or more of such ratio number shall be entitled to one additional representative, but said addition shall extend only to the nine counties having the greatest population.

"Ratio of representation. SECTION 36. The General Assembly shall, at the first regular session held following the adoption of this amendment, and at each succeeding regular session held next after the taking of such census, fix the ratio of representation, and apportion the additional representatives, as herein before required."

Respectfully submitted,

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MOTION TO EXPEDITE THE CONSIDERATION OF PETITION FOR CERTIORARI, TO DISPENSE WITH THE PRINTING OF THE RECORD AND TO ADVANCE THE DATE OF ORAL ARGUMENT.

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IN THE

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Respondents.

MOTION TO EXPEDITE THE CONSIDERATION OF PETITION FOR CERTIORARI, TO DISPENSE WITH THE PRINTING OF THE RECORD AND TO ADVANCE THE DATE OF ORAL ARGUMENT.

Comes now the Petitioners in the above entitled cause and through their counsel, move the Court, as follows:

1. For an Order to expedite the granting or denial of this Petition for Certorari by consideration of such Petition by the court at the earliest time possible in light of the Court's docket, and fairness to other litigants and the parties herein.

2. In the event such Petition is granted, for an order

(a) Dispensing with the printing of the record in the case, and

(b) Advancing the date of oral argument of this case

All for the purpose of obtaining a final adjudication of this case prior to the end of the legislative session of the Iowa State General Assembly.

Said motions are made on the grounds more fully set forth below:

(1) The Petition of Certiorari is from a judgment of the Supreme Court of the State of Iowa holding the so called "1965 Iowa temporary reapportionment plan" violative of the equal protection clauses of both state and federal constitution solely because said plan failed to provide for subdistricting of the state legislative districts.

(2) The Iowa Supreme Court, while permitting the impending general election in November, 1966 to be conducted under the plan held invalid, retained jurisdiction of the case for the purpose of reviewing the action of the 62nd General Assembly with regard to a reapportionment plan constructed along the guide lines set forth in the opinion of the Court.

(3) The 62nd General Assembly convenes in January, 1967, and the session is not expected to last more than 100 days; that the next regular session of the legislature will not convene until January of 1969.

(4) That counsel has been informed that the condition of the docket is such that this case will not be reached for oral argument until sometime during the Spring of 1966, and unless the state legislature has the benefit of a final adjudication of this case prior to the end of its session, it will be required to either ignore the mandate of the State Supreme Court, or to adopt a reapportionment plan of a temporary or permanent nature pursuant to the guidelines set forth in the State Court opinion; those guides require state wide subdistricting.

(5) The Petition for Certiorari was taken for the purpose of, and on the basis of, challenging the State Court's decision that subdistricting was constitutionally required by the equal protection clause of the federal constitution.

(6) The record in this case, apart from the record printed in the Court below, ten copies of which were filed pursuant to Rule 21, with the Petition of Certiorari, consists solely of a limited number of exhibits, which can easily be reproduced for the consideration by the Court; that Petitioners believe that if the Petition be granted, substantial time can be saved if the printing requirement be dispensed with, with no untoward inconvenience to the parties, or to the Court. Petitioners believe that sufficient copies of the printed record in the Court below are available, at this time, to meet the

requirements as to the number of copies. Petitioners have been advised by counsel for respondents that a suitable stipulation can probably be entered with regard to the designation of the record, and no delay is forseen in obtaining a suitable record of this case, outside of the delay in printing thereof. Petitioners rely solely upon such saving of time as grounds for their motion to dispense with the printing of the record.

(7) Petitioners believe that the case can be fully and adequately briefed by both parties prior to January 1, if this petition be granted before November 1, 1966.

Respectfully submitted,

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